

The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal

Michael P. Scharf

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THE TOOLS FOR ENFORCING INTERNATIONAL CRIMINAL JUSTICE IN THE NEW MILLENNIUM: LESSONS FROM THE YUGOSLAVIA TRIBUNAL

*Michael P. Scharf**

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"It is Easy to Say never again; but much harder to make it so."

—President Bill Clinton to the U.N. General Assembly,
September 21, 1999.¹

I. INTRODUCTION

After the Nazis exterminated six million Jews during the Holocaust, the world community pledged "never again." The victorious Allied powers set up an international tribunal at Nuremberg to prosecute the Nazi leaders for their monstrous deeds.² There was hope that the legacy of Nuremberg would be the institutionalization of a judicial response to atrocities throughout the world.

Yet, the bold international prohibitions against mass atrocities codified in the aftermath of Nuremberg withered as states systematically failed to enforce these norms. The hope of "never again" quickly became the reality of "again and again" as the world community declined to take action to bring those responsible to justice when four million people were murdered in Stalin's purges (1937-1953), five million were annihilated in China's Cultural Revolution (1966-1976), two million were butchered in Cambodia's killing fields (1975-1979), 30,000 disappeared in Argentina's Dirty War (1976-1983), 200,000 were massacred in East Timor (1975-1985), 750,000 were exterminated in Uganda (1971-1987), 100,000 Kurds were gassed in Iraq (1987-1988), and 75,000 peasants were slaughtered by death squads in El Salvador (1980-1992).³ Richard Goldstone, the first Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, has concluded that the failure to prosecute Pol Pot (Cambodia), Idi Amin (Uganda), and Saddam Hussein (Iraq), among others, encouraged the Serbs to launch their policy of ethnic cleansing in the former Yugosla-

1. Michael Kelly, *Shame on Clinton for ignoring genocide in Rwanda and Sierra Leone*, BOSTON GLOBE, Jan. 13, 2000, at A19.

2. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and the Charter of the International Military Tribunal annexed thereto, Aug. 8, 1945, art. 1, 82 U.N.T.S. 279.

3. See Arle Levinson, *Genocide a Thriving Doctrine in 20th Century*, STAR, Sept. 18, 1995, at A1.

via (1991-1995) and the Hutus to commit genocide in Rwanda (1994) with the expectation that they, too, would not be held accountable for their international crimes.⁴

In 1993, the U.N. Security Council, finally freed from its cold war paralysis, created a modern-day Nuremberg Tribunal to prosecute those responsible for international crimes in the Yugoslavia conflict.⁵ A year later, the Security Council created a second ad hoc tribunal to prosecute those responsible for genocide in Rwanda.⁶ The creation of these ad hoc tribunals fueled momentum toward the establishment of a permanent International Criminal Court ("ICC"). On July 17, 1998, 120 States voted to approve the text of a treaty creating an ICC designed to prosecute those accused of genocide, crimes against humanity, and the most serious war crimes across the globe.⁷ The ICC treaty is likely to enter into force within the next five years.⁸

It is one thing to create an international institution devoted to enforcing international justice; it is quite another to make international justice work. Unlike the Nuremberg Tribunal, whose orders were implemented by the Allied occupation forces, the ICC will have no constabulary. In the absence of a direct enforcement mechanism, the ICC will have to rely on state cooperation and indirect means of inducing compliance with its arrest orders and requests for judicial cooperation.

The range of enforcement measures potentially available to the ICC include: (1) condemnation of non-cooperation by the Assembly of State Parties or the U.N. Security Council; (2) offers of individual cash rewards for assistance in locating and apprehending indicted war criminals; (3) use of luring by deception to obtain custody over indicted war criminals; (4) freezing the assets of indicted war criminals; (5) offers of economic incentives to governments to induce cooperation; (6) imposition of diplomatic and economic sanctions on non-co-

4. See Michael P. Scharf, *The Case for A Permanent International Truth Commission*, 7 DUKE J. COMP. & INT'L L. 375, 398 (1997).

5. See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *annexed to Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704/Annexes (1993) [hereinafter ICTY Statute].

6. See Statute of the International Tribunal for Rwanda, *annexed to S.C. Res. 955*, U.N. SCOR, 49th Sess., at 20, U.N. Doc. S/INF/50 (1996).

7. See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183.9 (1998) (*reprinted in* M. CHERIF BASSIOUNI, *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 39 (1998)) [hereinafter Rome Treaty].

8. As of January 2000, over 90 countries had signed the Rome Treaty, indicating their intention to ratify it. Sixty ratifications are necessary to bring it into force. See *Rome ICC Treaty Conference: Rome Statute Signature and Ratification Chart* <<http://www.igc.org/icc/rome/html/ratify.htm>>.

operating governments; and (7) use of military force to effectuate apprehension. Drawing upon the recent experience of the Yugoslavia Tribunal, this Article examines the potential usefulness of these enforcement measures to the ICC.

II. THE PURPOSES OF INTERNATIONAL CRIMINAL JUSTICE

When the U.N. Security Council adopted Resolution 808 (1993), in which it decided to establish the Yugoslavia Tribunal (the ICTY),⁹ four of the Permanent Members of the Security Council delivered stirring remarks endorsing the concept of an international judicial solution to the Balkan crisis,¹⁰ while the fifth Permanent Member, China, merely reserved its position on the matter. An examination of these "Explanations of Vote" sheds light on what the international community expected to be achieved through the establishment of the ICTY, and provides a context for assessing the problems of enforcement that the ICTY has faced and that the ICC, in turn, is likely to encounter.

- The Delegate of France, the primary sponsor of the Resolution establishing the ICTY, stated:

Prosecuting the guilty is necessary if we are to do justice to the victims and to the international community. Prosecuting the guilty will also send a clear message to those who continue to commit these crimes that they will be held responsible for their acts. And finally, prosecuting the guilty is, for the United Nations and particularly for the Security Council, a matter of doing their duty to maintain and restore peace.¹¹

- The United Kingdom Representative remarked:

There has been an outburst of anger at these shocking developments. All parties share responsibility for these breaches. We believe that the Serbs have been most culpable in these hideous practices, but we also believe that all such actions must be condemned; they must be investigated; and the perpetrators must be called to account, whoever is responsible, throughout the territory of the former Yugoslavia.¹²

9. See *Report of the Security-General Pursuant to Paragraph 2 of Security Council Resolution 808*, at para. 28, U.N. Doc. S/25704 (1993) (reprinted in 2 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 157-58 (1995)).

10. See *id.* (presenting the record of debate leading to the adoption of Resolution 808).

11. MORRIS & SCHARF, *supra* note 9, at 163-64.

12. *Id.* at 167.

- The United States Representative (Madeline Albright, now Secretary of State) declared:

This will be no victor's tribunal. The only victor that will prevail in this endeavor is the truth

The events in the former Yugoslavia raise the questions of whether a State may address the rights of its minorities by eradicating those minorities to achieve ethnic purity. Bold tyrants and fearful minorities are watching to see whether ethnic cleansing is a policy the world will tolerate. If we hope to promote the spread of freedom, or if we hope to encourage the emergence of peaceful, multi-ethnic democracies, our answers must be a resounding "no."¹³

- The Russian Representative expressed similar sentiments:

[Today's] Resolution should serve the purpose of bringing to their senses those who are ready to sacrifice for the sake of their political ambitions the lives and dignity of hundreds and thousands of totally innocent people.

Nor should we forget that violations of international humanitarian law are also taking place in the course of other armed conflicts. We believe the Council's adoption of today's resolution will also serve as a serious warning to those guilty of mass crimes and flagrant violations of human rights in other parts of the world.¹⁴

As indicated in the excerpts quoted above, the Permanent Members of the Security Council articulated six distinct justifications for the Yugoslavia War Crimes Tribunal. The first of these, indicated in the French intervention, was to provide justice for the victims. As the Tribunal's former Prosecutor Richard Goldstone noted, "the Nuremberg Trials played an important role in enabling the victims of the Holocaust to obtain official acknowledgement of what befell them."¹⁵ Such acknowledgement constitutes a partial remedy for their suffering and a powerful catharsis that can discourage acts of retaliation. According to Antonio Cassese, who served as the ICTY's first President, the "only civilized alternative to this desire for revenge is to render justice," for otherwise "feelings of hatred and resentment seething below the surface will, sooner or later, erupt and lead to renewed violence."¹⁶

13. *Id.* at 165-66 (quoting Secretary of State Warren Christopher).

14. *Id.* at 169.

15. Richard J. Goldstone, *Fifty Years after Nuremberg: A New International Criminal Tribunal for Human Rights Criminals*, in *CONTEMPORARY GENOCIDES: CAUSES, CASES, CONSEQUENCES* 215 (Albert J. Jongman ed., 1996).

16. INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, FIRST ANNUAL REPORT, at para. 15, U.N. Doc. IT/68 (1994).

Second, as suggested by the United Kingdom's comments, the Tribunal would establish accountability for individual perpetrators. By assigning guilt to specific perpetrators on all sides, the Tribunal would avoid the assignment of collective guilt which had characterized the years following World War II and in part laid the foundation for the commission of atrocities during the Balkan conflict. "Far from being a vehicle for revenge," Antonio Cassese explained, by individualizing guilt in hate-mongering leaders and by disabusing people of the myth that adversary ethnic groups bear collective responsibility for the crimes, "the ICTY is an instrument for reconciliation."¹⁷

Third, as the French Delegate pointed out, the operation of the Tribunal would deter continued perpetration of atrocities in the Balkans. As support for this objective, David Scheffer, the U.S. Ambassador-at-Large for War Crimes Issues, observed: "We know from experience in Bosnia that local authorities—camp commanders and temporary local officials—sometimes do what they can to improve the circumstances of those under their care once they know that the international community will investigate and punish those who fail to respect human rights standards."¹⁸ Richard Goldstone added that the existence of the ICTY may have deterred human rights violations during the Croatian army offensive against Serb rebels in August 1995. "Fear of prosecution in the Hague," he believed, "led Croat authorities to issue orders to their soldiers to protect Serb civilian rights when Croatia took control of the Krajina and Western Slavonia regions of the country."¹⁹

The international prosecution of responsible individuals can become an instrument through which respect for the rule of law is instilled into the popular consciousness.²⁰ As judge Gabrielle Kirk McDonald, who presided over the ICTY's first trial, succinctly put it: "We are here to tell people that the rule of law has to be respected."²¹ By broadcasting televised highlights of the trials throughout Bosnia and Serbia, that message can get through directly to the citizenry. As Richard Goldstone further explained, "People don't relate to statistics, to generalizations. People can only relate and feel when they hear somebody that they can identify with telling what happened to

17. *Id.* at para. 16.

18. David J. Scheffer, *International Judicial Intervention*, 102 FOREIGN POL'Y 34 (1996).

19. *War Crimes Prosecutor Says Tribunal May Have Deterred Violations*, DEUTSCHE PRESSE-AGENTUR, Jan. 26, 1996, available in LEXIS, Nexis Library International News File.

20. See Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia?*, 20 HUM. RTS. Q. 737, 749 (1998) [hereinafter Akhavan, *Justice in the Hague*].

21. William W. Horne, *The Real Trial of the Century*, AM. LAW., Sept. 1995, at 5.

them. That's why the public broadcasts of the Tribunal's cases can have a strong deterrent effect."²²

Fourth, according to the French Delegate, the Tribunal's activities would facilitate restoration of peace in the Balkans. Through its prosecutions, the Tribunal would promote the dismantling of the institutions and a discrediting of the leaders that encouraged, enabled, and carried out the commission of humanitarian crimes. There would be particular benefit to laying bare to Serbs unscathed in Belgrade the ghastly consequences of blood-curdling nationalistic rhetoric. Even for those who support Bosnian Serb leader Radovan Karadzic and Yugoslav President Slobodan Milosevic, "it will be much more difficult to dismiss live testimony given under oath than simple newspaper reports," the Tribunal's Deputy Prosecutor, Graham Blewitt points out. "The testimony will send a reminder in a very dramatic way that these crimes were horrendous."²³

Fifth, as the U.S. Representative remarked, the Tribunal would develop an historic record for a conflict in which distortion of the truth has been an essential ingredient of the ethnic violence. If, to paraphrase George Santayana, a society is condemned to repeat its mistakes when it has not learned the lessons of the past, then a reliable record of those mistakes must be established in order to prevent their recurrence. Michael Ignatieff recognizes that "[t]he great virtue of legal proceedings is that their evidentiary rules confer legitimacy on otherwise contestable facts. In this sense, war crimes trials make it more difficult for societies to take refuge in denial—the trials do assist the process of uncovering the truth."²⁴ The Chief Prosecutor at Nuremberg, Supreme Court Justice Robert Jackson, underscored the logic of this proposition when he reported to President Truman that one of the most important legacies of the Nuremberg trials following World War II was that they documented the Nazi atrocities "with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people."²⁵ Similarly, in proving the existence of crimes against humanity and genocide, the Yugoslavia Tribunal would generate a comprehensive record of the nature

22. Interview with Justice Richard Goldstone, Brussels, Belgium (July 20, 1996).

23. Interview with Graham Blewitt, Deputy Prosecutor of the International Tribunal for the Former Yugoslavia, The Hague, Netherlands (July 25, 1996).

24. Michael Ignatieff, *Articles of Faith*, in INDEX ON CENSORSHIP (Sept./Oct. 1996) (reprinted in 294 HARPER'S MAG. 15, 15 (March 1997)).

25. Report to the President from Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals, June 7, 1945 (reprinted in 39 AM. J. INT'L L. 178, 184 (Supp. 1945)).

and extent of violations in the Balkans, how they were planned and executed, the fate of individual victims, who gave the orders and who carried them out. By carefully proving these facts one witness at a time in the face of vigilant cross-examination by distinguished defense counsel, the international trials would produce a definitive account that can pierce the distortions generated by official propaganda, endure the test of time, and resist the forces of revisionism.

Finally, as both the United States and Russia stressed, the Tribunal would serve as a deterrent to perpetration of atrocities elsewhere. The punishment of crimes committed in the Balkans would send the message, both to potential aggressors and vulnerable minorities, that the international community will not allow atrocities to be committed with impunity. According to Richard Goldstone,

“[i]f people in leadership positions know there’s an international court out there, that there’s an international prosecutor, and that the international community is going to act as an international police force, I just cannot believe that they aren’t going to think twice as to the consequences. Until now, they haven’t had to. There’s been no enforcement mechanism at all.”²⁶

Payam Akhavan of the staff of the ICTY contends that “the deliberations of the Security Council indicate that the complementarity of peace and justice was considered and accepted by virtually all member states.”²⁷ But other commentators have maintained that “nothing could be further from the truth than to say that there was a consensus on the compatibility between peace and legal justice.”²⁸ There was widespread belief that questionable motives lurked behind the Security Council’s articulated rationales for the Tribunal. Several commentators argued that the Council’s justifications were merely a pretense, calculated to mask the reluctance of the Western powers to take resolute action to repress the policy of ethnic cleansing.²⁹ According to the Ambassador of Bosnia-Herzegovina to the United Nations, Muhamed Sacirbey, “[j]ustice was held out, in reality, as an alternative to real immediate measures to confront the crime or the criminals.”³⁰

26. Goldstone Interview, *supra* note 22.

27. Payham Akhavan, *The Yugoslavia Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond*, 18 HUM. RTS. Q. 259, 263 (1996) [hereinafter Akhavan, *The Yugoslavia Tribunal*].

28. David P. Forsythe, *International Criminal Courts: A Political View*, 15 NETHERLANDS Q. HUM. RTS. 5, 9 (1997) [hereinafter Forsythe, *International Criminal Courts*].

29. See Akhavan, *Justice in the Hague*, *supra* note 20, at 9.

30. Muhamed Sacirbey, in NO PEACE WITHOUT JUSTICE, INTERNATIONAL CAMPAIGN FOR THE ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL COURT 54 (1997).

Others believed the Tribunal would be used as a “bargaining chip,” to be bartered away at the negotiating table.³¹

Professor David Forsythe of the University of Nebraska has written that, for the United States, the creation of the Tribunal was an instrument for pacifying critics that would generate “the appearance of action against gross violations of human rights, but without great sacrifice of outsiders’ blood or treasure.”³² In addition to the public relations benefit, the United States recognized that even without bringing a single perpetrator to trial, an international indictment and arrest warrant could serve to isolate offending leaders diplomatically, strengthen the hand of domestic rivals, and fortify the international political will to expand economic sanctions or approve airstrikes.³³

According to Forsythe, the United Kingdom considered the Tribunal an impediment to a negotiated peace, but “knew that opposing criminal prosecution could be politically awkward” and therefore played a “double diplomatic game of public endorsement but private opposition.”³⁴ China and Russia, he suggests, were opposed to the creation of the Tribunal but “for reasons of deference to a hegemonic U.S., or to deflect criticism from their own human rights record . . . chose not to vigorously contest an ad hoc court” of limited jurisdiction.³⁵

The test of whether the international community intended the ICTY to achieve the goals of international justice articulated by its founders (achieving accountability, truth telling, deterrence, and reconciliation), or rather to serve merely as a “Potempkin Court” as Forsythe and Sacirbey suggest, was whether the Tribunal would be given the resources and support necessary to effectively accomplish its mission.

III. PAYING THE PRICE FOR INTERNATIONAL CRIMINAL JUSTICE

The first thing needed to enforce international justice is money—a substantial amount of it. If done right, international justice is extremely expensive. Erecting and administering courtrooms, offices, and jails; paying the salaries of judges, prosecutors, defense counsel,

31. See Anthony D’Amato, *Peace vs. Accountability in Bosnia*, 88 AM. J. INT’L L. 500, 503-04 (1994).

32. David P. Forsythe, *Politics and the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 401 (1994) [hereinafter Forsythe, *Politics and the International Tribunal*].

33. See Michael P. Scharf, *The Politics Behind U.S. Opposition to the International Criminal Court*, 6 BROWN J. WORLD AFF. 97, 99 (1999).

34. Forsythe, *International Criminal Courts*, *supra* note 28, at 8.

35. *Id.*

investigators, translators, secretaries, and security guards; providing transportation, housing, and protection for witnesses; and conducting complex trials in multiple languages—can cost hundreds of millions of dollars annually.³⁶

To put the costs of international justice in perspective, one must recall that the ICTY was seeking to prosecute political and military leaders responsible for the murder and torture of hundreds of thousands of victims. The closest domestic analogue is the trial of major mob figures or terrorists, which in the United States have cost as much as \$70 million for a single trial.³⁷

While the expenses of international justice might seem reasonable when compared to that of domestic justice in the United States, as a creature of the Security Council, the ICTY was funded out of the budget of the United Nations. In seeking funding, the ICTY encountered problems of competing institutional interests within the U.N. system, and interference from entirely unrelated issues, most notably the non-payment of United States dues, which pushed the United Nations to the verge of bankruptcy.³⁸

As a result, during its first several years, the ICTY was remarkably underfunded. Instead of the \$32.6 million the Secretary-General requested to fund the International Tribunal for its first year of operation (1994),³⁹ the General Assembly granted a provisional budget of one third that amount.⁴⁰ During its second year of operation (1995), the General Assembly had approved a bare-bones \$32 million budget which would cover only the cost of renting the west wing of the Aegon building in The Hague, rental and contracting of equipment and services, and salaries and expenses for a staff of 108 (eleven judges, nineteen prosecutors, twenty-three investigators, ten defense counsel, ten members of the Registry, twelve clerical staff, twelve security

36. The ICTY's budget for 1999 was \$90 million. U.S. General Accounting Office Report, *Former Yugoslavia—War Crimes Tribunal's Workload Exceeds Capacity*, GAO/NSIAD-98-134, June 2, 1998 [hereinafter *Workload Exceeds Capacity*].

37. "The 1992 trial of New York mob boss John Gotti cost the U.S. Government \$75 million and the 1997 trial of Oklahoma City bomber Timothy McVeigh cost the U.S. Government \$50 million." VIRGINIA MORRIS & MICHAEL P. SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* 683 (1998).

38. See Michael P. Scharf & Tamara Shaw, *International Institutions*, 33 INT'L LAW. 567, 567-70 (1999).

39. See *Report of the Secretary-General as Requested by the General Assembly in Resolution 47/235*, at 6, U.N. Doc. A/C5/48/44/Add.1 (1994) [hereinafter *Resolution 47/235*].

40. See G.A. Res. 48/241, U.N. GAOR, 48th Sess., Supp. No. 49, at 30, U.N. Doc. (1994).

guards, and twenty-eight interpreters).⁴¹ In all, 75% of the funds budgeted were allocated for the judges, administration, and overhead.⁴² Less than 2% of the total was "budgeted for the critical work of tracking down witnesses, obtaining and translating their accounts, exhuming mass graves and conducting post-mortems, [sic] and providing medical and forensic expertise."⁴³ No funds at all were budgeted for witness protection, counseling, and security.

This 1995 budget betrayed an extraordinary ignorance of the task that faced the prosecution. According to Richard Goldstone's estimates, the average case before the Tribunal would require statements from 100 victims or witnesses, each averaging between twenty and thirty-five pages; an additional 400 pages of documents (military maps and charts); over 100 photographs (autopsies and scene of the crime); between twenty and forty video tapes; twenty audio tapes; physical evidence (weapons; uniforms, etc.), and exhumation examination reports. Between sixty and eighty witnesses may have to attend each actual trial.⁴⁴

To make matters worse, in 1995 the United Nations faced a funding crisis that pushed it to the brink of insolvency, with significant consequences for the ICTY. U.N. members owed the organization \$3.1 billion, with more than half that amount owed by the United States. Under a scale of assessments agreed to in the early years of the Organization, the United States is obligated to pay 25% of the United Nations' regular budget and 30% of its peacekeeping budget. During the Reagan Administration, the United States began to fall behind in its payments, amassing a huge debt to the United Nations. The Bush Administration had adopted a five year repayment plan, but in 1994 Congress reneged, and by 1995 the United States was \$1.6 billion in arrears to the United Nations.⁴⁵

With the United Nations literally running out of cash, the Secretariat slowed the supply of funds to the ICTY to a trickle. As a consequence, the Office of the Prosecutor was prevented from spending

41. See *Resolution 47/235*, *supra* note 39 (revised cost estimates); *Report of the Secretary-General as Requested by the General Assembly in Resolution 47/235*, U.N. Doc. A/C5/48/44 (1993) (original estimate).

42. See *Prepared Testimony of Thomas S. Warrick, Special Counsel, Coalition for International Justice Before the House Committee On International Operations and Human Rights, Re: United Nations Support For the Yugoslavia and Rwanda War Crimes Tribunal*, Federal News Service, Oct. 26, 1995, available in LEXIS, Nexis Library, Federal News Service File [hereinafter *Warrick Testimony*].

43. *Prosecute Bosnia's War Criminals*, N.Y. TIMES, Jan. 4, 1995, at A18.

44. See IAIN GUEST, *ON TRIAL: THE UNITED NATIONS, WAR CRIMES AND THE FORMER YUGOSLAVIA* 139-40 (1995).

45. See WASH. WKLY. REP., Mar. 18, 1996.

money to send investigators into the field to investigate the 1995 massacre of 8,000 civilians at the U.N. "safe area" of Srebrenica. The Office was also precluded from recruiting lawyers, or renewing contracts of current personnel as a result of restrictions on United Nations agencies imposed by the Secretary-General in the face of the fiscal crisis. Evidence already gathered from refugee interviews began to pile up unsifted and untranslated.⁴⁶ And the Tribunal's first trial involving a Serb prison camp guard captured in Germany, which was scheduled to begin in November 1995, was postponed until May 6, 1996, for want of \$78,000 for expenses for defense counsel and investigators.⁴⁷

The Tribunal's Prosecutor, Richard Goldstone, normally the consummate team player, decided the time had come to take his case to the international press. "If these restrictions continue, they will . . . 'render unconscious the Yugoslav tribunal,'" Goldstone told the international press.⁴⁸ "The criminal justice system cannot conduct itself if resources are turned on and off," he added.⁴⁹ Joining Goldstone's public plea, the Tribunal's President, Judge Antonio Cassese told the General Assembly, "[a]ll these undertakings are costly—of that there is no doubt; but if the United Nations wants to hear the voice of justice speak loudly and clearly, then the Member States must be willing to pay the price."⁵⁰

This blunt message apparently had its desired effect. Despite its continuing budget difficulties, the United Nations approved a \$35 million budget for the Tribunal in 1996, a \$48 million budget in 1997, a \$70 million budget in 1998, and a \$94 million budget in 1999.⁵¹ These numbers are extraordinary given the fact that the overall U.N. budget has been frozen since 1994 at the urging of the United States, but they have not proven sufficient for the expensive mission of the ICTY.

In 1998, the U.S. Government Accounting Office ("GAO") conducted a study of the ICTY which concluded that, even with its newly expanded budget, the Tribunal "does not have the capacity to handle

46. See Marlise Simons, *Bosnian Rapes Go Untried by U.N.*, N.Y. TIMES, Dec. 7, 1994, at A12.

47. See Warrick Testimony, *supra* note 42.

48. Raymond Bonner, *U.N. Fiscal Woes Are Said to Threaten War Crime Tribunals*, N.Y. TIMES, Oct. 4, 1995, at A8.

49. *Id.*

50. Remarks of Antonio Cassese, 52nd Plenary Meeting of the United Nations General Assembly, at 3, U.N. Doc. A/50/PV.52 (1995).

51. See *Bulletin of the International Criminal Tribunal for the Former Yugoslavia*, No. 18 <<http://www.un.org/icty/BL/18perse.htm>>. These figures have been augmented by in-kind contributions of equipment and loaned personnel (approximately 50 a year), and voluntary cash contributions from 28 countries and organizations. See *Workload Exceeds Capacity*, *supra* note 36.

its current workload [with over 30 indictees in custody], and the problem is likely to get worse.”⁵² The GAO noted that the Tribunal receives new information at the rate of 20,000 pages of documents a month, which it has been unable to process. Altogether, the backlog of evidence potentially “vital to ongoing or planned investigations” includes “over 800,000 pages of documents, about 9,000 photographs, and so much unviewed videotape we estimate it would take one person over two years to watch.”⁵³ The GAO added that the Tribunal could not provide investigators to conduct work in Kosovo without seriously hampering ongoing investigations and trial preparations.⁵⁴ The GAO also pointed out that the Tribunal’s trial backlog of cases raised fair trial concerns, as indictees have to wait for up to three years before their trials can begin.⁵⁵

In sum, though its financial situation has steadily improved, the ICTY has been consistently underfunded by the United Nations, hindering its ability to conduct investigations and sift through evidence in its possession, and delaying trials at the expense of due process. Richard Goldstone has rationalized that “[t]he Tribunal has been the child of an insolvent parent, with all the consequences that has.”⁵⁶ If that is the case, the financial prospects of the ICC are likely to be even more precarious. According to Article 115 of the Rome Statute, the ICC is to be funded from assessed contributions made by State Parties, as well as funds provided by the United Nations when a case is referred to the ICC by the Security Council.⁵⁷ Since the State Parties to the Rome Statute will be substantially fewer in number than the members of the United Nations and may not include many of the nations which pay the largest percentages to the U.N. budget, the pool of resources available to the ICC will be much more limited than those available to the ICTY. This will mean that the ICC, like the ICTY, will likely experience persistent financial difficulties which will negatively effect, and may ultimately thwart, its mission.

52. *Workload Exceeds Capacity*, *supra* note 36, at 9.

53. *Id.* at 17-18.

54. *See id.* at 14.

55. *See id.* at 10-11, 18-19.

56. Goldstone Interview, *supra* note 22 (quoted in MICHAEL P. SCHARF, *BALKAN JUSTICE* 84 (1997)).

57. *See Rome Treaty*, *supra* note 7, at art. 115.

IV. ENFORCING INTERNATIONAL JUSTICE THROUGH FINANCIAL INDUCEMENTS

This section examines the potential uses of financial inducement as a means of enforcing international criminal justice. As described below, financial inducement can be used as a stick (as with the threat or imposition of trade embargoes and the freezing of assets), or as a carrot (as with the conditional promise of reconstruction aid or the offer of "rewards").

A. *Security Council Sanctions*

Article 41 of the U.N. Charter authorizes the Security Council to impose a range of sanctions in an effort to restore international peace and security, and Article 25 requires the members of the United Nations to comply with Security Council-imposed sanctions.⁵⁸ The experience of the ICTY indicates the difficulties of using economic sanctions as a means to empower an international criminal court.

Prior to the creation of the ICTY, on May 30, 1992, the Security Council adopted Resolution 757, imposing sweeping economic sanctions on the Federal Republic of Yugoslavia (Serbia and Montenegro) ("the FRY") and the Bosnian Serb entity known as Republika Srpska to punish them for committing atrocities in Bosnia.⁵⁹ The sanctions regime established by this resolution, however, was littered with loopholes and contained no enforcement mechanisms.⁶⁰ As Serb atrocities continued unabated, the sanctions were later strengthened through the adoption of Security Council Resolution 787 in November 1992⁶¹ and Security Council Resolution 820 in April 1993.⁶²

Collectively, these resolutions imposed an embargo on imports to and from the FRY and Bosnian Serb entity, prohibited air flights to and from the FRY, called upon States to seize FRY-registered vessels and vehicles, froze the assets of the FRY government, and prevented representatives of the FRY from participating in international sporting events.⁶³ Most importantly, Resolution 820 authorized a multilateral interdiction force to enforce the sanctions on the Adriatic Sea, effectively imposing a naval blockade against the FRY.⁶⁴ On the land,

58. See U.N. CHARTER art. 25, 41.

59. See S.C. Res. 757, U.N. SCOR, 3082d mtg., U.N. Doc. S/RES/757 (1992).

60. See Michael P. Scharf & Joshua L. Dorosin, *Interpreting UN Sanctions: The Rulings and Role of the Yugoslavia Sanctions Committee*, 19 BROOK. J. INT'L L. 771, 807-10 (1993).

61. S.C. Res. 787, U.N. SCOR, 3137th mtg., U.N. Doc. S/RES/787 (1992).

62. S.C. Res. 820, U.N. SCOR, 3200th mtg., U.N. Doc. S/RES/820 (1993).

63. See Scharf & Dorosin, *supra* note 60, at 796-811.

64. See S.C. Res. 820.

enforcement of the sanctions was monitored by NATO Sanctions Assistance Missions, located on the borders of the front-line states. The Security Council made the phased lifting of sanctions conditional on the agreement of the leaders of the FRY and Bosnian Serbs to the proposed European Union-United Nations peace plan⁶⁵ and, after the adoption of Resolution 827, on their cooperation with the ICTY.⁶⁶

Although the FRY asserted that its constitution prohibited the surrender of Serb nationals to the ICTY and that it otherwise lacked the necessary domestic legislation to comply with the Tribunal's orders, Resolution 827 specifically required all States to take any measures necessary under their domestic law to implement the provisions of the Resolution. Under international law, a State has a duty to comply with its international legal obligations, including binding Chapter VII Security Council Resolutions, which take precedence over all domestic legal obligations. A State may not legitimately assert that it is unable to fulfill its international legal obligations on the basis that it is prohibited from doing so by domestic legislation, or that it lacks the necessary domestic authority.⁶⁷

The sanctions were not immediately effective, but by 1994, they were beginning to have a significant impact on the FRY's economy. At that time, professor David Forsythe accurately predicted that if fighting in Bosnia were to cease, "outside interest in sanctions on states for not extraditing war criminals—sanctions that hurt the sanctioning states as well—would decline markedly."⁶⁸ Thus, following the initialling of the Dayton Peace Agreement on November 21, 1995, the Security Council adopted Resolution 1022, whereby it decided to suspend "indefinitely with immediate effect" the economic sanctions which it had imposed against the FRY and Republika Srpska beginning in 1992.⁶⁹ The representative of the United Kingdom explained the decision to lift sanctions in the following terms:

In August last year, Belgrade took a significant step in deciding to close its border with the Bosnian Serbs until they were prepared to accept a negotiated settlement. This Council rightly responded by granting a limited package of sanctions relief, conditional on the border remaining closed. The existence of this Peace Agreement is the clearest possible vindication of the Council's use of economic

65. *See id.*

66. *See* S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993); David Ottaway, *U.S. Warns Serbs on War Trials*, WASH. POST, Jan. 17, 1994, at A19.

67. *See* U.N. CHARTER art. 25; VIENNA CONVENTION ON THE LAW OF TREATIES, May 23, 1969, 1115 U.N.T.S. 331, art. 27.

68. Forsythe, *Politics and the International Tribunal*, *supra* note 32, at 416.

69. S.C. Res. 1022, U.N. SCOR, 359th mtg. at 2, U.N. Doc. S/RES/1022 (1995).

sanctions to bring about change. It is therefore right that this Council should now reward Belgrade's contribution to the successful outcome of the Dayton negotiations by granting very substantial sanctions relief.⁷⁰

Resolution 1022 contained a potentially important provision for the reintroduction of economic sanctions in the event of noncompliance with the Dayton Agreement. Paragraph 3 of the resolution provided:

if at any time, with regard to a matter within the scope of their respective mandates and after joint consultation if appropriate, either the High Representative [for civilian implementation] . . . or the commander of the international force . . . informs the Council via the Secretary-General that the Federal Republic of Yugoslavia or the Bosnian Serb authorities are failing significantly to meet their obligations under the Peace Agreement, the suspension [of economic sanctions] shall terminate on the fifth day following the Council's receipt of such a report, unless the Council decides otherwise taking into consideration the nature of the non-compliance.⁷¹

Consequently, either High Representative for Civilian Implementation Carl Bildt, or IFOR commander Admiral Leighton Smith could trigger automatic reimposition of sanctions in the event of Serb non-compliance with the Dayton mandates.

The Dayton Accords contained several provisions requiring the parties to cooperate with the Yugoslav Tribunal. Article IX of the General Framework Agreement and Article XIII(4) of the Agreement on Human Rights required the parties thereto (Bosnia, Croatia, and the FRY) to cooperate fully with and give unrestricted access to the Yugoslav Tribunal, and this requirement was extended to the Republika Srpska by Article IV of the Agreement on Civilian Implementation. Moreover, Article IX(1) of the new Constitution of Bosnia prohibited any person who has been indicted by and has failed to comply with an order to appear before the Tribunal from holding any appointive, elective, or other public office in the territory of Bosnia. In addition, it required all competent authorities in Bosnia to cooperate with and to grant unrestricted access to the Tribunal. Referring to these obligations, U.S. Ambassador to the United Nations, Madeline Albright warned:

My Government again stresses the importance of every country's obligation to cooperate with the Tribunal and to comply with its orders. Unless they comply with their obligations, the parties to the conflict cannot expect to reap the benefits of peace, [and] ensure the permanent easing of economic sanctions⁷²

70. U.N. SCOR, 3595th mtg. at 3, U.N. Doc. S/PV.3595 (1995).

71. S.C. Res. 1022, at 2.

72. U.N. SCOR, 3607th mtg. at 20, U.N. Doc. S/PV.3607 (1995).

On paper, Resolution 1022 seemed to create an ideal mechanism for inducing cooperation with the ICTY. By making a report from Carl Bildt or Leighton Smith the automatic trigger, the resolution would avoid the need to seek Security Council approval for reimposition of sanctions in the event the FRY or Bosnian Serbs breached their obligations under the Dayton Accords, thus depoliticizing the process (and circumventing an almost certain Russian veto).

But in practice, there were three problems with the trigger mechanism. First, rather than providing for an incremental reimposition of sanctions, it made reimposition an all-or-nothing proposition, which would thus be psychologically difficult for Bildt or Smith to employ. Second, the resolution did not specifically define the term "significant failure" to include refusal to surrender indicted persons to the Tribunal, although that was the understanding of the United States and other members of the Council.⁷³ The third problem was that the trigger mechanism was placed in the hands of the two officials who, given their personalities and backgrounds, were least likely to use it. Carl Bildt, the leader of the opposition in the Swedish Parliament, was the European Union's mediator in the last phase of the Bosnian conflict. As mediator, Bildt had a reputation for yielding to the Bosnian Serb aggressors.⁷⁴ He came under criticism for opposing NATO air strikes when the Bosnian Serbs murdered thousands of civilians in the "safe area" of Srebrenica, and for refusing to reproach the Serbs for their actions at Srebrenica until three months after the massacre.⁷⁵ As discussed below, Admiral Smith for his part was no fan of the ICTY and had a penchant for narrowly interpreting the provisions of Security Council resolutions concerning the Tribunal.⁷⁶

Despite the fact that the preamble of Resolution 1022 noted that "compliance with the requests and orders of the International Tribunal for the former Yugoslavia constitutes an essential aspect of implementing the Peace Agreement," Carl Bildt and Admiral Smith did not view the refusal to arrest or transfer indicted persons to the Tribunal, or the continued presence of such persons in official positions in the Republika Srpska as a "significant failure" to meet the obligations under the Dayton Agreement within the meaning of Resolution 1022. Thus, no triggering report to the Security Council was forthcoming from either Bildt or Smith when the Tribunal informed them that the

73. See *id.*

74. See Anthony Lewis, *Early Signs of Progress in Bosnia Are Far from Encouraging*, SEATTLE POST-INTELLIGENCER, Dec. 12, 1995, at A16, available in LEXIS, Nexis Library News File.

75. See *id.*

76. See RICHARD HOLBROOKE, *TO END A WAR* 339 (1998).

FRY and Republika Srpska had refused to comply with the Tribunal's arrest warrants and that a number of persons indicted by the Tribunal continued to hold official positions in Prijedor and Foca.⁷⁷ In May of 1996, Bildt warned the FRY that its failure to cooperate with the Tribunal risked reimposition of the sanctions, but he never followed this up with any action.⁷⁸

Then, over the strong objections of Alija Izetbegovic (the President of Bosnia's new coalition government), the Ministers of the Contact Group on Bosnia (Germany, the United States, France, the United Kingdom, and Russia) decided to recommend that the Security Council make the suspension of sanctions permanent.⁷⁹ This action was seen as an appropriate reward to the FRY for formally recognizing the new Bosnian Government and for supporting democratic elections in Bosnia in September 1996. Consequently, on October 1, 1996, the Security Council adopted Resolution 1074, permanently terminating the Yugoslav sanctions and disbanding the Sanctions Committee,⁸⁰ thus giving away potentially the most effective mechanism for pressuring the Serbs to surrender indicted persons to the Yugoslav Tribunal.

Although Resolution 1074 warned that the Council would "consider the imposition of measures if any party fails significantly to meet its obligations under the Peace Agreement,"⁸¹ it was clear that the Council would never be able to muster the necessary votes among the permanent members to reimpose such sweeping sanctions against the

77. See *Third Annual Report of the International Criminal Tribunal for the Former Yugoslavia*, at paras. 167-69, U.N. Doc. S/1996/665 (1996) [hereinafter *Third Annual Report*]. Following Rule 61 hearings in the cases of *Nikolic*, *Karadzic and Mladic*, and *Rajic*, the President of the Yugoslavia Tribunal notified the Security Council of the refusal of the Republika Srpska, the Federal Republic of Yugoslavia, and Croatia, respectively, to surrender the accused to the Tribunal. See *Letter from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia to the President of the Security Council*, Oct. 31, 1995, U.N. Doc. S/1995/910 (1995) (*Nikolic case*); *Letter dated July 11, 1996 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 Addressed to the President of the Security Council*, U.N. Doc. S/1996/556 (1996) (*Karadzic and Mladic case*); *Letter dated Sept. 16, 1996 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 Addressed to the President of the Security Council*, U.N. Doc. S/1996/763 (1996) (*Rajic case*).

78. See *Bildt Urges Bosnian Serb War Criminals Be Turned Over*, DEUTSCHE PRESSE-AGENTUR, May 20, 1996, available in LEXIS, Nexis Library International News File.

79. John M. Gochko, *U.N. Sanctions Against Bosnia to Be Lifted; Election Certification by Council Expected*, WASH. POST, Sept. 27, 1996, at A31.

80. See S.C. Res. 1074, U.N. SCOR, 3700th mtg. at paras. 2 and 6, U.N. Doc. S/RES/1074 (1996).

81. *Id.* at para. 5.

FRY. The sanctions on Yugoslavia cost Russia about \$2 billion, and immediately after the lifting of the sanctions, Russia moved to restore its economic and financial ties to the FRY.⁸² Thus, it should have come as no surprise that in 1996 when the Yugoslav Tribunal reported that the FRY had repeatedly refused to comply with the orders of the Tribunal,⁸³ the Security Council condemned the failure to arrest and transfer the individuals involved, but it declined to reimpose any sort of sanctions to enforce compliance.⁸⁴ Graham Blewitt, the Tribunal's Deputy Prosecutor, lamented that the Security Council's position sent a signal to the Serbs that there would be no consequences for non-compliance with the Tribunal's orders, thereby encouraging their continued refusal to cooperate.⁸⁵

In light of the Security Council's inaction, on February 9, 1999, the FRY formally announced that it would never extradite Mile Mrksic, Veselin Sljivancanin and Mirslav Radic, the three Serb officers whose surrender was requested on charges relating to their alleged involvement in the killing of 260 unarmed men at Ovcara farm near Vukovar in 1991.⁸⁶ Seven months later, during her departing speech, the ICTY's outgoing chief judge, Gabrielle Kirk McDonald, derided the Security Council for ignoring its responsibility to compel Serbia and Croatia to turn over suspected war criminals. McDonald explained how she had made two personal appeals and four more in writing to the Security Council to compel the Serbian leadership to turn over the three Serbs, known as "the Vukovar Three," who are wanted for war crimes in Croatia. In response, she said, "the Council has done nothing."⁸⁷

This does not bode well for the ICC's enforcement regime. When the ICC prosecutes on the basis of a referral by a State Party⁸⁸ or

82. See Laurie A. Cohen, *Application of the Realist and Liberal Perspectives to the Implementation of War Crimes Trials: Case Studies of Nuremberg and Bosnia*, 2 UCLA J. INT'L L. & FOR. AFF. 113, 153 (1997).

83. Following Rule 61 hearings in the cases of *Nikolic*, *Karadzic* and *Mladic*, and *Rajic*, the President of the Yugoslavia Tribunal has notified the Security Council of the refusal of the Republika Srpska, the Federal Republic of Yugoslavia, and Croatia, respectively, to surrender the accused to the Tribunal. See *supra* note 77.

84. See Daphna Shrager & Ralph Zacklin, *The International Criminal Tribunal for Rwanda*, 7 EUR. J. INT'L L. 501, 517 (1996).

85. See Interview with Graham Blewitt, Deputy Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, The Hague, Netherlands (Aug. 11, 1998).

86. See *Croatia Arrests Croatian Serbs Suspected of War Crimes While Yugoslavia Rejects War Crime Tribunal Extradition Requests*, 15 INT'L L. ENFORCEMENT RPTER. 128 (1999).

87. Colum Lynch, *Departing War Crimes Tribunal Chief Assails U.N. Inaction*, WASH. POST, Nov. 9, 1999, at A26.

88. See Rome Treaty, *supra* note 7, at art. 14.

where the Prosecutor initiates the investigation,⁸⁹ the ICC will have to rely on the voluntary cooperation of states for the surrender of indicted persons and the provision of evidence.⁹⁰ The experience of the ICTY suggests that states will frequently refuse to provide such cooperation despite their clear treaty obligations to comply with the Tribunal's orders. The ICC's only recourse in such a situation is to make a finding that the state has failed to cooperate and then refer the matter to the Assembly of States Parties.⁹¹ The Assembly's only enforcement mechanism is the issuance of a statement condemning the failure to cooperate—which is unlikely to have much effect.

In contrast, where the ICC acts on a referral by the Security Council,⁹² in theory the potential for enforcing the ICC's orders would be much greater. Even states that are not party to the Rome Treaty would be bound to comply with the ICC's orders pursuant to their obligations under Article 25 of the U.N. Charter. If they fail to comply with this obligation, the ICC can refer the matter to the Security Council for enforcement through the imposition of sanctions.⁹³ But the experience of the ICTY indicates that, even in the most egregious of situations, the Security Council is unlikely to impose sanctions in the event of non-cooperation with the ICC, especially where the target state's trading partners include one or more of the Permanent Members of the Council which wield a veto.

B. Targeting Specific Individuals: Freezing of Assets

As mentioned above, one of the Security Council sanctions initially imposed on the FRY was the freezing of all government assets in foreign banks. In the context of the United Nations' efforts to dislodge the military regime from Haiti in 1993, the Security Council adopted Resolution 841, which required U.N. member states to freeze the assets located within their jurisdiction of known supporters of the military regime.⁹⁴ This was the first time the Security Council acted under Article 41 of the U.N. Charter to freeze the assets of private individuals rather than a government.

Drawing upon the Haiti precedent, the author of this Article proposed in a book published in 1998 that the Security Council should

89. *See id.* at art. 15.

90. The parties to the Rome Treaty would have a treaty obligation to comply with the ICC's orders, but no obligation would apply to non-state parties. *See id.* at art. 86.

91. *See id.* at art. 87(7).

92. *See id.* at art. 13.

93. *See id.* at art. 87(7).

94. *See* S.C. Res. 841, U.N. SCOR, 3238th mtg. at 3, U.N. Doc. S/RES/841 (1993).

pass a resolution requiring states to seize and freeze the assets of any person subject to an international arrest warrant who refuses to surrender to the ICTY.⁹⁵ Such action “would (1) further isolate persons indicted by the International Tribunal, (2) serve as an effective penalty even if such persons evade justice, and (3) induce such persons to surrender themselves to the International Tribunal.”⁹⁶ Radovan Karadzic, in particular, is said to be protected by a small mercenary force which he pays for through funds on deposit in Cyprus.⁹⁷ Tying up Karadzic’s offshore funds, therefore, would greatly facilitate his capture.

Because these sanctions would be targeted at specific individuals, not governments, it would seem to be easier to gain support of the members of the Security Council for such a measure.⁹⁸ However, David Scheffer, the U.S. Ambassador-at-Large for War Crimes Issues, later informed the author that he had circulated an assets freeze proposal along the lines suggested to the members of the Security Council, and had encountered stiff opposition to the idea.

When the ICTY indicted Slobodan Milosevic and four other FRY officials on May 27, 1999, the Office of the Prosecutor of the Yugoslav Tribunal discovered a creative way to circumvent the problem of Security Council recalcitrance. Pursuant to Article 19(2) of the Tribunal’s Statute, the Milosevic indictment directed states to provisionally freeze any assets of the accused located in their territories until the accused are taken into custody.⁹⁹

The authority cited for this action, Article 19 of the Tribunal’s Statute, merely provides that “upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.”¹⁰⁰ While it was not originally envisaged that Article 19 would be used as the basis for the freezing of the accused’s assets, the Prosecutor explained that the decision to request such an order “was taken in light of the consistent non-cooperation of the FRY with the Tribu-

95. See MARSHALL FREEMAN HARRIS ET AL., MAKING JUSTICE WORK 50 (1998).

96. *Id.*

97. See R. Jeffrey Smith, *Secret Meetings Foiled Karadzic Capture Plan; U.S. Says French Jeopardized Mission*, WASH. POST, Apr. 23, 1998, at A32.

98. See *id.*

99. See ICTY Press Release, *President Milosevic and Four Other Senior FRY Officials Indicted for Murder, Persecution and Deportation in Kosovo*, at 3, U.N. Doc. JL/PIU/403-E (1999) [hereinafter *ICTY Press Release*].

100. ICTY Statute, *supra* note 5, at art. 19.

nal and the possibility that such assets be used to evade arrest.”¹⁰¹ Because the orders of the Tribunal are “considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations,” the Tribunal’s order theoretically has the equivalent force of law of a binding Security Council Resolution.¹⁰²

While the assets freeze ordered by the Yugoslav Tribunal may have rankled some of the members of the Security Council who had opposed Ambassador Scheffer’s proposal the year before, the order was timed to avoid any serious challenge. A month earlier, the European Union foreign ministers meeting in Luxembourg had decided to freeze the assets of Milosevic and his core associates in the territory of EU countries.¹⁰³ Like Radovan Karadzic, Milosevic’s fortune is reported to be held in Cypriot banks. Cyprus, which is one of five countries earmarked for accelerated accession to the European Union, decided to cooperate in the assets freeze.¹⁰⁴ For its part, the United States welcomed the decision of the Yugoslav Tribunal to require the freezing of the assets of the indicted Serb officials, and announced that they had been pronounced “Specially Designated Nationals” whose property would be blocked pursuant to Executive Order 13088.¹⁰⁵

Although the ICTY has not made the freezing of assets of indicted war criminals a general policy beyond the Milosevic indictment, through an unexpected legal interpretation, the Tribunal has managed to equip itself with a powerful new financial tool to induce compliance with its arrest warrants. Compared to other forms of financial inducement such as imposition of economic sanctions and conditionality of reconstruction aid—which hurt the population at large, as well as the target country’s trading partners—freezing the assets of indicted war criminals is a precision tool for promoting justice. It is a tool of great potential value to the ICC, which would be available where its jurisdiction is triggered by the Security Council.

C. Conditional Assistance

Sanctions are punitive in nature and are politically difficult to impose and enforce. Conditionality of economic assistance, on the other hand, creates a positive incentive for a particular course of conduct and does not require action by the Security Council.

101. *ICTY Press Release*, *supra* note 99, at 3.

102. S.C. Res. 808, *supra* note 9, at para. 126.

103. *See Cyprus Vows to Honour Tighter EU Sanctions on Yugoslavia*, AGENCE FRANCE PRESSE, Apr. 27, 1999, available in LEXIS, Nexis Library International News File.

104. *See id.*

105. *See* U.S. Department of State, Daily Press Briefing (James Rubin), May 28, 1999.

Annually from 1996 to 1999, dozens of countries and international organizations met for a Bosnian aid summit to determine the amount and modalities of reconstruction assistance they would provide post-conflict Bosnia. The top priority of the effort, however, was not inducing the parties to the Yugoslav conflict to cooperate with the International Tribunal, but rather to create a stable economy in which people could find work in order to allow for the return to Bosnia of 1.7 million refugees and displaced persons.¹⁰⁶

At the 1996 London Summit, donor nations vowed to increase pressure on authorities in the former Yugoslavia who had failed to extradite indicted war criminals. The donor nations issued a warning that reconstruction aid would be closely linked to cooperation with the Yugoslav Tribunal. As the U.S. Ambassador to the United Nations warned: "It is a simple proposition, but a critical one. The benefits of economic and financial assistance should not go to those who thwart the will of this Council's requirement to cooperate with the war crimes Tribunal."¹⁰⁷

Despite this warning, no action was taken to suspend the hundreds of millions of dollars in aid earmarked for the Republika Srpska when its President, Biljana Plavsic, in a letter addressed to the U.N. Secretary-General in early January 1997, stated that there will be no cooperation with the ICTY, and warned that the arrest of indicted Bosnian Serbs would cause "massive civil and military unrest."¹⁰⁸ A spokesman for the office of the Civilian High Representative, entrusted with the task of implementing the civilian aspects of the Dayton Accords, expressed disapproval of Plavsic's letter, but indicated that "it makes no difference . . . on the flow of reconstruction aid."¹⁰⁹

The initial failure to actually condition aid reflected the prevailing view that the withholding of funds until a party complies with its obligation to cooperate with the Tribunal would undercut the goal of rapid economic revival and the positive incentive of commercial gain to entice nationalist groups to abandon their separatist interests.¹¹⁰ It was felt that steps to impose international economic isolation would only work in favor of extremists who have an interest in perpetuating

106. See Stephane Barbier, *Bosnia to Get 1.25 Billion Dollars in Aid in 1998*, AGENCE FRANCE PRESSE, May 8, 1998, available in LEXIS, Nexis Library International News File.

107. U.N. SCOR, 3607th mtg. at 20, U.N. Doc. S/PV.3607 (1995).

108. AP, *Won't give up war crimes suspects, Bosnian Serb president tells U.N.*, TORONTO STAR, Jan. 9, 1997, at A14.

109. M2, Presswire, Press Briefing Transcript for Jan. 10, 1997, Jan. 13, 1997, available in LEXIS, newsfile.

110. See Susan L. Woodward, *Implementing Peace in Bosnia and Herzegovina: A Post-Dayton Primer and Memorandum of Warning*, BROOKINGS DISC. PAPERS 37 (1996).

the martyr complex among Bosnian Serbs.¹¹¹ Thus, the policy of conditional aid became de facto a policy of constructive engagement.

But it soon became clear that the policy of constructive engagement was depriving the Yugoslav Tribunal of one of its few means of exerting pressure on recalcitrant authorities and that, with the indicted warlords still in control of Republika Srpska, the financial assistance was being diverted from its intended beneficiaries. Consequently, out of a total of \$3.1 billion pledged for Bosnian reconstruction in 1997, only 15% was earmarked to the Republika Srpska,¹¹² while the other 85% went to the Croat-Muslim Federation to reward it for its compliance with the Dayton Accords and its cooperation with the Yugoslav Tribunal.¹¹³

By the 1998 summit in Brussels, however, international aid donors were expressing confidence in the "new climate" in Bosnia. Under its new Prime Minister, Milorad Dodik, the Republika Srpska agreed to let the ICTY Prosecutor open an office in Banja Luka, and convinced two Bosnian Serb indictees (Milan Simic and Miroslav Tadic) to turn themselves in to the Tribunal.¹¹⁴ With these events as a backdrop, the donor nations pledged an additional \$1.25 billion in reconstruction aid for Bosnia and, noting with satisfaction the "efforts at reconciliation by the new republika Srpska," they decided that the new aid package would be "more balanced than in the past."¹¹⁵

The mechanism of financial inducement achieved its largest measure of success with respect to Croatia. Croatia allowed the ICTY Prosecutor to open an office in Zagreb in November 1994, but failed to execute the arrest warrants issued by the Tribunal. In the face of threats by the United States to veto substantial International Monetary Fund ("IMF") and World Bank loans to Croatia, in April 1997 Croatia surrendered indicted Bosnian Croat war criminal Zlatko Aleksovsk, who had commanded the notorious Kaonik detention facility, to the Tribunal.¹¹⁶ That same month indicted Croatian General Tihofil Blaskic voluntarily surrendered to the Tribunal through the mediation of the Croatian government.

When it was disclosed that ten indicted Bosnian Croats had been given refuge in Croatia, the United States moved to block another

111. *See id.*

112. *See Barbier, supra* note 106.

113. *See Third Annual Report, supra* note 77, at para. 167.

114. *See* Misha Savic, *Two Serbs Suspected of War Crimes Surrender Voluntarily to Tribunal*, SAN DIEGO U. TRIB., Feb. 15, 1998, at A24.

115. Barbier, *supra* note 106.

116. *See* ICTY Press Release, *Accused Aleksovski Turned Over to the Tribunal*, U.N. Doc. CC/PIO/185-E (1997).

crucial IMF loan to Croatia. Immediately thereafter, on October 6, 1997, Dario Kordic and nine other indicted Bosnian Croats “voluntarily” surrendered to the Tribunal under pressure from Zagreb. Kordic, the Vice-President of the Croatian Community of Herzeg-Bosna, is the highest ranking indicted Croat war criminal.¹¹⁷ The development took the Croat public by surprise as only two weeks earlier the Croatian Prime Minister, Zlatko Matesa, set a defiant tone on the subject of the extradition of war crime suspects: “We will not trade with our people or extradite them in order to get loans.”¹¹⁸ Kordic explained his surrender as a patriotic act on behalf of the Croatian state which has been “subject[ed] to tremendous unjust pressure from the international community.”¹¹⁹ The day that Kordic was surrendered, the IMF approved the loan to Croatia.¹²⁰ In August 1999, a thirteenth indicted Croat war criminal (Vinko Martinovic) was transferred from Croatia to the Tribunal.¹²¹ Thus, Croatia’s cooperation, induced by the conditionality of financial assistance, resulted in the surrender of half of the indicted war criminals in custody at The Hague.

Positive economic incentives have been used in the past to induce parties to make peace, as for example, in the mideast. The ICTY precedent suggests that the same type of approach can be used to successfully coax parties into cooperating with the ICC. The advocates of this approach, however, will always be at odds with those who favor constructive engagement as a means for reforming a society in the aftermath of conflict marked by atrocities.

D. *The Offer of Rewards*

Another type of positive financial inducement is the offering of rewards for assistance in the arrest of indicted war criminals.

As with assassination, international law prohibits putting a price on an enemy’s head.¹²² But that does not mean that States cannot offer a

117. See Chris Hedges, *10 Bosnian Croats Surrender to War Crimes Tribunal*, N.Y. TIMES, Oct. 7, 1997, at A3; Louis-Marie Tattet, *Ten Bosnian Croat War Crimes Suspects Surrender to UN*, AGENCE FRANCE PRESSE, Oct. 6, 1997, available in LEXIS, Nexis Library International News File.

118. *Premier Rejects Linking Aid and Cooperation with War Crimes Tribunal*, BBC SUMMARY OF WORLD BROADCASTS, Sept. 25, 1997, available in LEXIS, newsfile.

119. Hedges, *supra* note 117, at A3.

120. *Id.*

121. See ICTY Press Release, *Vinko Martinovic (“Stela”) Surrendered to ICTY By the Republic of Croatia*, U.N. Doc. CC/P.I.S./427-e (1999).

122. See Michael P. Scharf, *Clear and Present Danger: Enforcing the International Ban on Biological and Chemical Weapons Through Sanctions, Use of Force, and Criminalization*, 20 MICH. J. INT’L L. 477, 496 n.94 (1999) [hereinafter Scharf, *Clear and Present Danger*].

reward for information or assistance leading to the arrest and conviction of indicted war criminals. On June 24, 1999, the United States announced that it was offering a reward of \$5 million for such information and assistance related to indicted Yugoslav war criminals.¹²³

The U.S. rewards program was established by the 1984 Act to Combat International Terrorism, Public Law 98-533. Under the program, in addition to the reward money, the recipients and their immediate family members may be relocated to the United States, or elsewhere, and are assured of complete confidentiality.¹²⁴ To date, more than \$6 million has been paid out for help in twenty terrorism cases.¹²⁵ In October 1998, the U.S. Congress enacted legislation expanding the rewards program to cover war crimes, as well as terrorism.¹²⁶ Whereas the terrorism rewards program is operated out of the office of Diplomatic Security, the war crimes rewards will be coordinated by Robert Gelbard's office, which is in charge of carrying out the Dayton Accords.¹²⁷

Thousands of flyers and posters, advertising the U.S. War Crimes Rewards program, have been distributed throughout Europe and the former Yugoslavia.¹²⁸ The immediate effect of this program is likely to be the identification of indicted Yugoslav war criminals in European countries where many have taken refuge under assumed identities. It may also serve to further isolate Serb warlords in Republika Srpska, who will quickly lose trust in colleagues who could be plan-

123. See Peter Almond, *US Puts \$5m Price on the Head of War Criminal Milosevic*, EVENING STANDARD (LONDON), June 25, 1999, at 2.

124. See U.S. Department of State Bureau of Diplomatic Security, *Counter-Terrorism Rewards Program* <<http://www.heroes.net/pub/heroes/content2.html>>.

125. See Almond, *supra* note 123, at 2.

126. See *U.S. Will Offer Bounties for Bosnian War Crimes Suspects*, 15 INT'L ENFORCEMENT L. REPTR. 39 (1999).

127. See *id.*

128. The text of these flyers reads as follows:

Since 1991, thousands of residents of the former Yugoslavia have been raped, murdered, tortured or imprisoned. The victims of these crimes against humanity deserve justice. Many of these crimes are serious violations of international humanitarian law, and many of the people who committed them are subjects of criminal indictments by the United Nations International Criminal Tribunal for the Former Yugoslavia. To bring to justice those who have been indicted for these crimes, the United States Government is offering a reward for information.

Individuals who furnish information leading to the arrest or conviction in any country, of a war criminal indicted by the International Criminal Tribunal, may be eligible for a reward of up to \$5 million, and protection of their identities. A reward may also be paid for information leading to the transfer to, or conviction by, the International Criminal Tribunal of an indicted war criminal.

Diplomatic Security Service, U.S. Department of State, Crimes Against Humanity <<http://www.heroes.net/warcrimes/torture.html>>.

ning to turn them in for millions in reward money. With respect to Slobodan Milosevic, who became the first head of state with his picture on a "wanted poster," it will constitute a strong symbolic gesture, fueling the popular effort to replace the Serb leader. The ICC could similarly benefit from the institution of a rewards program. The amount required for reward offers is a relatively small price compared to the costs of running the ICC, which are discussed above.

V. ENFORCING INTERNATIONAL JUSTICE THROUGH USE OF FORCE

Despite the creation of the ICTY and the Western countries' repeated promises to support the Tribunal's mandate, NATO failed to use force to implement international criminal justice—by apprehending indicted war criminals in its area of operations in Bosnia. To justify its inaction, the NATO commanders claimed that NATO's mandate in Bosnia did not permit use of force in aid of international criminal justice except under extremely limited circumstances (i.e., when indicted war criminals are "encountered in the course of its duties and if the tactical situation permits").¹²⁹ As a result, until July 1997, NATO forces declined to apprehend a single war criminal, prompting the ICTY's chief Prosecutor at the time, Louise Arbour, to complain to the press: "I think it's scandalous that those who have the responsibility for his arrest continue to fail to fulfill that obligation."¹³⁰ Later, NATO forces were used to apprehend a handful of low and mid-level indictees, while indicted Bosnian Serb leaders Radovan Karadzic and Ratko Mladic, and Serb President Slobodan Milosevic, were given de facto impunity. This experience indicates both the great potential and immense difficulty posed by the use of military force as a tool for enforcing international criminal justice.

A. *The Obligation to Arrest War Criminals*

On December 20, 1995, a 60,000-personnel NATO Implementation Force known as IFOR (which a year later was transformed into the 30,000 strong NATO Stabilization Force known as SFOR) was deployed in Bosnia.¹³¹ One of the great mysteries surrounding the Bosnia peace settlement is whether IFOR's failure to arrest war

129. See *Press Briefing by National Security Adviser Berger on Bosnia*, U.S. NEWswire, July 10, 1997 [hereinafter *Berger Press Briefing*].

130. Lee Hockstader, *The Rumor Heard Round the World*, WASH. POST, Sept. 27, 1997, at A14.

131. See *Peace Agreements Bring a 'Long-Delayed Birth of Hope': Multinational Force Set Up in Bosnia to Replace UNPROFOR*, 33 U.N. CHRON. 25, 26 (1996).

criminals was a product of the way its mandate was drafted in the Dayton Accords and related Security Council Resolution or the way its mandate was implemented by reluctant NATO commanders.

IFOR's mandate and mission were set forth in Security Council Resolution 1031, adopted on December 13, 1995, which authorizes "IFOR" to "take such actions as required, including the use of necessary force, to ensure compliance with Annex 1-A of the Peace Agreement."¹³² Article X of Annex 1-A provides *inter alia* that the parties undertake to "cooperate fully with all entities involved in implementation of this peace settlement" such as those which are authorized by the Security Council "including the International Tribunal for the former Yugoslavia."¹³³ Read together, these provisions give IFOR the authority to use force to ensure compliance with the Yugoslavia Tribunal's arrest orders.

To the extent there was any ambiguity in this regard, it was eliminated by the statements made by the representatives of the United States, the United Kingdom, and France in the Security Council at the time Resolution 1031 was adopted. Thus, in her explanation of vote, Ambassador Albright of the United States remarked:

Let me emphasize that Annex 1-A of the Dayton Agreement obligates the parties to cooperate fully with the International Tribunal. The North Atlantic Council can now underscore this obligation by explicitly authorizing IFOR to transfer indicted persons it comes across to the Tribunal and to detain such persons for that purpose.¹³⁴

Echoing this position, the U.K. representative stated:

Should it be decided that, in the execution of its assigned tasks, the Implementation Force should detain and transfer to the appropriate authorities any persons indicted by the Tribunal who come into contact with it in Bosnia, then the authority to do so is provided by the draft resolution before us, read together with the provisions of the Peace Agreement.¹³⁵

France, too, affirmed that paragraph 5 "recognizes the role that IFOR may play to ensure proper cooperation" with the Tribunal.¹³⁶ The other members of the Security Council did not make any specific statements concerning the role of IFOR in the arrest of suspects, but

132. S.C. Res. 1031, U.N. SCOR, 3607th mtg., U.N. Doc. S/PV.3607 (1995).

133. *Dayton Peace Accords*, Annex, U.N. Doc. A/50/810-S/1995/1021 (1995).

134. S.C. Res. 1031, at 20.

135. *Id.* at 18.

136. *Id.* at 21.

Russia warned that it “will consistently defend the need to avoid unjustified use of force in the course of the operation.”¹³⁷

There are several limitations inherent in IFOR’s mission statement as set forth above. First, IFOR was provided the “authority” but not the “duty” to arrest indicted persons. Had the Council wished to explicitly give IFOR this responsibility, it could have used the phrase “calls upon” rather than “authorizes.” Second, in accordance with the United States and British interpretive statements, this authority was limited to indicted war criminals that IFOR “comes across” or “comes into contact with”—giving ammunition to those who would argue that it would be inappropriate for IFOR to actively seek out such persons for arrest. Finally, Article XII of Annex 1-A provides that “the IFOR Commander is the final authority in theater regarding interpretation of this agreement on the military aspects of the peace settlement”¹³⁸ Therefore, it is within the IFOR Commander’s complete discretion to determine whether or not action to arrest an indicted war criminal is warranted in the particular circumstances of a case.

The day the Dayton Accords were signed by the Parties in Paris, the President and the Prosecutor of the Yugoslavia Tribunal issued a joint statement. The statement underscored “the authority of IFOR to arrest indicted war criminals” and concluded that “this Agreement promises that those who have committed crimes which threaten international peace and security – genocide, crimes against humanity and war crimes – will be brought to justice.”¹³⁹ But this optimistic public assessment of the role of IFOR in apprehending indicted war criminals was not shared behind the scenes by many of the Tribunal’s top officials. Grant Niemann, the Tribunal’s Senior Trial Attorney, bluntly told the author of this Article that “The Dayton Agreement doesn’t seriously attempt to address the arrest and detention issue. Anyone who says otherwise is deluded or lying.”¹⁴⁰

In his recently published memoir, Richard Holbrooke, the U.S. Chief Negotiator at Dayton, describes the story behind the crafting of IFOR’s limited mandate with respect to arresting indicted war criminals. Holbrooke maintains that he argued that the Dayton Accords explicitly give the NATO force responsibility to arrest war criminals but the Pentagon, supported by National Security Adviser

137. *Id.* at 25.

138. *Dayton Peace Accords*, *supra* note 133.

139. ICTY Press Release, *Joint Statement By the President and the Prosecutor*, U.N. Doc. CCI/PIO/027-E (1995).

140. Interview with Grant Niemann, Senior Trial Attorney in the Yugoslavia Tribunal’s Office of the Prosecutor, The Hague, Netherlands (Aug. 11, 1998).

Tony Lake and Secretary of Defense William Perry, opposed expanding IFOR's mandate beyond disengaging the warring parties and force protection.¹⁴¹ Military commanders were anxious to avoid a repeat of the disaster in Somalia, where eighteen American troops were ambushed and slaughtered while trying to apprehend the warlord Mohammed Farrah Aidid. Holbrooke recounts that "as a result of the scars left over from the Mogadishu affair in Somalia, the [military] would not accept the assignment of search and capture of war criminals unless they had a force structure two or three or five times larger than the 60,000" envisioned in the Dayton Accords.¹⁴² A week before the Dayton negotiations, a compromise was reached in which the Pentagon agreed to accept "the authority" to make arrests "but not the obligation."¹⁴³ In his memoir, Holbrooke laments, "had I known then how reluctant IFOR would be to use its 'authority,' I would have fought harder for a stronger mission statement."¹⁴⁴

Richard Holbrooke claims that he told President Clinton on the eve of Dayton: "If we are going to create a real peace rather than an uneasy cease-fire . . . Karadzic and Mladic will have to be captured. This is not simply a question of justice but also of peace. If they are not captured, no peace agreement we create in Dayton can ultimately succeed."¹⁴⁵ According to Holbrooke, President Clinton concurred, saying "[i]t is best to remove both men."¹⁴⁶ But the President never gave the military a direct instruction to that effect, and as this Article goes to press six years after Dayton, the NATO forces have still taken no action to bring Karadzic and Mladic into custody.¹⁴⁷

Thus, Holbrooke publicly blamed the Pentagon and the President, but others believe the failure to give NATO the responsibility of arresting war criminals may actually have been a quid pro quo countenanced by Holbrooke and the other Dayton negotiators in return for Slobodan Milosevic's support of the Dayton Accords.¹⁴⁸ Graham Blewitt, the Yugoslavia Tribunal's Deputy Prosecutor confided that the Office of the Prosecutor has had continuing concerns about whether there were any side deals. According to Blewitt: "To this day

141. See HOLBROOKE, *supra* note 76, at 216-18.

142. Louis Freedberg, *Talking Your Way Out of Hell: When Richard Holbrooke Sat Down at an Ohio Table to Pound Out a Pea*, SAN FRANCISCO CHRON., Apr. 7, 1996, available in LEXIS, Nexis Library News File (quoting Richard Holbrooke).

143. HOLBROOKE, *supra* note 76, at 222.

144. *Id.* at 223.

145. *Id.* at 226, 315.

146. *Id.* at 315.

147. See *id.* at 316.

148. See Forsythe, *International Criminal Courts*, *supra* note 28, at 11.

we don't know whether there were any. Maybe one day we will find out. But that is one of the concerns, that people were made promises that even if they signed and agreed to certain things that they wouldn't be held accountable."¹⁴⁹

At a minimum, Holbrooke had to have recognized that the Pentagon's insistence on a limited role for IFOR made his job, as negotiator easier. On the eve of the Dayton talks, the Prosecutor of the Yugoslavia Tribunal, Richard Goldstone, pressed the United States to beef up the provisions on arrests of war criminals.¹⁵⁰ Holbrooke reportedly responded that he would not make the war crimes issue a "show stopper" to the larger peace settlement.¹⁵¹

As noted above, under the Dayton Accords, the person responsible for determining whether action by IFOR to arrest indicted war criminals is warranted was IFOR Commander Admiral Leighton Smith. Smith literally interpreted away IFOR's limited mandate to arrest war criminals. Upon assuming his command in January 1996, Admiral Smith told the press: "One of the questions I was asked was, 'Admiral, is it true that IFOR is going to arrest Serbs in the Serb suburbs of Sarajevo?' I said, 'Absolutely not, I don't have the authority to arrest anybody.'"¹⁵² He explained: "It would help a lot of people's tasks if [indicted Bosnian Serb war criminals Radovan Karadzic and Ratko Mladic] were gone, but I'm not authorized to do that. Hold those who signed Dayton responsible and get off IFOR's back."¹⁵³

In February 1996, the *Washington Post* ran a story alleging that Karadzic had driven unchallenged through four NATO checkpoints—two of them manned by Americans—on a trip between the Bosnian towns of Pale and Banja Luka. When confronted with the story, Admiral Smith reaffirmed that it was not the mission of his forces to go after indicted war criminals.¹⁵⁴ Since Article XII in Annex 1-A of the Dayton Accords provides that "the IFOR Commander is the final authority in theater regarding interpretation of this agreement," Smith's position was technically unassailable. This led the Tribunal's Prosecutor to declare in disgust: "There is no moral, legal or political justification for a military authority to grant effective immunity to persons

149. Blewitt Interview, *supra* note 85.

150. See Stephen Engelberg, *Panel Seeks U.S. Pledge on Bosnia War Criminals*, N.Y. TIMES, Nov. 3, 1995, at A1.

151. See *id.*

152. HOLBROOKE, *supra* note 76, at 328.

153. Tracy Wilkinson, *Bosnian Serb Leaders Seen as Barrier to Peace*, L.A. TIMES, Apr. 29, 1996, at A1.

154. See HOLBROOKE, *supra* note 76, at 339.

whom the prosecutor, on behalf of the Security Council, has determined should be brought to trial.”¹⁵⁵

The Dayton Accords and Resolution 1031 are not the only source of international law binding on the NATO force in Bosnia. In addition to being an enforcement measure of the Security Council under Chapter VII of the U.N. Charter, the Tribunal is also considered a subsidiary organ of the Security Council with delegated enforcement powers within the terms of Article 29 of the U.N. Charter.¹⁵⁶ The Tribunal’s Statute, approved by Security Council Resolution 827, grants the Tribunal the authority to issue international arrest warrants, which must be complied with “without undue delay.”¹⁵⁷ Article 48(2) of the U.N. Charter requires Member States to carry out the decisions of the Security Council (and its subsidiary bodies) under Chapter VII of the Charter “directly or through their action in the appropriate international agencies of which they are members”¹⁵⁸—which would include NATO.

Colonel John Burton, the Legal Counsel to the Chairman of the Joint Chiefs of Staff (“JCS”), explained the legal obligation that flows from such international arrest warrants in the following terms:

The Yugoslavia War Crimes Tribunal has issued these orders. Now, orders can be issued to . . . all the Member States who are going to play a part of this NATO force. And if those orders say not only in your territory, but in any jurisdiction under your control, would they apply in Bosnia? In other words, if the United States had such an order, that in Bosnia that the United States is charged to arrest and detain these people and turn them over, would we be bound? As far as a state obligation goes, I think that the answer is, “Yes.” We view these orders, and literally the Statute of the Tribunal itself, as well as the United Nations Resolution under Chapter VII that set it up, as binding.¹⁵⁹

Thus, according to the JCS Legal Counsel, IFOR would have to implement the Tribunal’s arrest warrants, provided two criteria were met: (1) the orders were issued to the NATO States; and (2) the orders referred to making arrests in Bosnia.

On July 11, 1996, a Trial Chamber of the Yugoslavia Tribunal issued an “International Arrest Warrant and Order for Surrender,” in the cases of Radovan Karadzic and Ratko Mladic which met these two

155. Jon Swain, *Serb War Criminals Flaunt Their Freedom*, SUNDAY TIMES, June 23, 1996, § 1, at 18.

156. See S.C. Res. 808, *supra* note 9, at para. 28.

157. ICTY Statute, *supra* note 5, at art. 29.

158. U.N. CHARTER art. 48, para. 2.

159. Colonel John T. Burton, “War Crimes” *During Operations Other Than War: Military Doctrine and Law 50 Years after Nuremberg and Beyond*, 149 MIL. L. REV. 199, 203-04 (1995).

criteria.¹⁶⁰ By virtue of Security Council Resolution 1088 (1996), which establishes SFOR as the legal successor to IFOR, this directive applies with continuing effect to SFOR. Yet, instead of arresting Karadzic and Mladic pursuant to this international legal obligation, IFOR instituted a controversial policy of “monitor, don’t touch.”

B. NATO Policy on Arresting Yugoslav War Criminals

1. Phase I: Monitor, Don’t Touch

When IFOR initially deployed in Bosnia “there was a perception that priority should be military disengagement,” and that “the tenuous stability which had been created could be undermined if NATO became entangled in arresting indicted war criminals.”¹⁶¹ According to Richard Holbrooke, “the military viewed the Serbs as a potent military force that would threaten IFOR as it had the U.N.”¹⁶² These fears were fanned by the incendiary statements emanating from the indicted Bosnian Serb leaders. Serbian President Slobodan Milosevic warned that Bosnia “could blow up” if IFOR attempted to arrest the Bosnian Serb leaders who had been indicted by the Tribunal.¹⁶³ And General Mladic promised that the IFOR forces would pay heavily if they tried to arrest him. “They have to understand one thing, that I am very expensive and that my people support me,” Mladic told an interviewer.¹⁶⁴

But, according to Major General William Nash, the commander of IFOR’s Task Force Eagle, “We overestimated the difficult task that we had in front of us.”¹⁶⁵ The reality of the situation was that “the Bosnian Serbs were a spent force” and that Mladic and especially Karadzic were vulnerable targets.¹⁶⁶ According to a Yugoslavia Tribunal official, in the months following Dayton, “it would have been possible to arrest Karadzic and Mladic with little consequences because the Bosnian Serbs were so demoralized. The failure to arrest them

160. See International Arrest Warrant and Order for Surrender, Case Nos. IT-95-5-R61, IT-95-18-R61 (July 11, 1996) (reproduced in Walter Gary Sharp, Sr., *International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia*, 7 DUKE J. COMP. & INT’L L. 411, 448-49 (1997)).

161. Interview with Payan Akhavan, Legal Adviser, Office of the Prosecutor, International Criminal Tribunal for the Former Yugoslavia, Netherlands, The Hague (Aug. 11, 1998).

162. HOLBROOKE, *supra* note 76, at 218.

163. See Jane Perlez, *War Crimes Prosecutor Vents Frustrations*, N.Y. TIMES, May 22, 1996, at A8.

164. *Shrugging Off Indictment, Bosnian Serb General Skis*, N.Y. TIMES, Mar. 11, 1996, at A3.

165. Interview with General William Nash, Cambridge, Massachusetts (Sept. 29, 1998).

166. HOLBROOKE, *supra* note 76, at 218.

allowed them to once again consolidate their power and begin to cause problems for the NATO forces."¹⁶⁷

Despite the menace posed by Karadzic and Mladic while they remained at large, according to Major General Nash, the Rules of Engagement permitted apprehending indicted war criminals only "if the risk was minimal and it would not result in a major fight."¹⁶⁸ In practice, "minimal risk" was interpreted as "zero risk."¹⁶⁹ Experts point to this so-called "zero casualty doctrine" as a significant reason why NATO failed to make any arrests in Bosnia for nineteen months following the deployment of IFOR.¹⁷⁰

A second reason for NATO's failure was the requirement that IFOR act only when indicted war criminals are "encountered." In February 1996, State Department spokesman Nicholas Burns explained IFOR's narrow interpretation of the term: "In the interests of freedom of movement in Bosnia, U.S. troops are not intercepting civilian cars at checkpoints. If our troops encounter [indicted war criminals] walking around, though, they will be detained."¹⁷¹ Thus one IFOR commander confirmed that his troops "would arrest suspects like Radovan Karadzic only if they literally stumble into an IFOR checkpoint."¹⁷²

In fact, the record suggests that IFOR would not even arrest indicted suspects under these circumstances. In August 1997, when IFOR inspectors learned that General Ratko Mladic happened to be inside a bunker they had planned to inspect, they rescheduled their visit rather than confront the indicted war criminal. Two days before the September 1997 elections in Bosnia, the United States Commander of IFOR, Admiral Joseph Lopez, met with Serb officials in the headquarters of Radovan Karadzic, who was reportedly inside the building at the time. "And in a virtuoso display of IFOR's talent for not 'stumbling into' Mladic or Karadzic, none of the 53,000 I-FOR troops deployed to provide security on election day in mid September

167. Akhavan Interview, *supra* note 161.

168. Nash Interview, *supra* note 165.

169. As the Yugoslavia Tribunal's Deputy Prosecutor, Graham Blewitt explained: "[i]f the NATO forces think there is any risk of casualties then they won't move." Blewitt Interview, *supra* note 85.

170. Akhavan Interview, *supra* note 161.

171. Barry Schweid, *U.S. Warns War Crimes Suspects to Avoid Traveling in Bosnia*, AP, Feb. 14, 1996, available at 1996 WL 4411795.

172. Diane F. Orentlicher, *Swapping Amnesty for Peace and the Duty to Prosecute Human Rights Crimes*, 3 ILSA J. INT'L & COMP. L. 713, 716 (1997).

had an arrest-worthy encounter with these men, although both reportedly turned out to vote.”¹⁷³

IFOR officials concocted a litany of excuses for their policy of non-action, including: (1) arresting war criminals would jeopardize the fragile Bosnian peace; (2) arresting war criminals could damage NATO’s image of impartiality among Bosnia’s factions and invite retaliation against NATO troops; (3) arresting war criminals would disrupt municipal and federal elections in Bosnia; (4) arresting war criminals is the responsibility of governments in the region, not international troops; (5) the NATO forces do not have reliable intelligence information about the whereabouts of the war criminals; and (6) NATO troops are not trained to arrest criminal suspects.¹⁷⁴

2. Phase II: Limited Case-by-Case Arrests

Consistent with IFOR’s narrow interpretation of its mandate, in the first months after their deployment, IFOR personnel were not provided a list of names, let alone pictures of the persons indicted by the Yugoslavia Tribunal.¹⁷⁵ Responding to public criticism of NATO troops for failing to apprehend Karadzic when he passed through NATO checkpoints, in February 1996 a new set of instructions were issued from NATO high command in Brussels.¹⁷⁶ Pursuant to these instructions, “Most Wanted” posters featuring photographs and descriptions of the indicted war criminals were placed at IFOR checkpoints, headquarters, and barracks.¹⁷⁷

While the dissemination of these posters might lead to more known “encounters” at NATO checkpoints, the new policy did not mean that IFOR troops would actively seek out the indicted war criminals for arrest. John Shalikashvili, Chairman of the Joint Chiefs of Staff informed Congress that even if IFOR had orders to arrest the indicted war criminals who are at large in Bosnia, the NATO force just does not have enough intelligence information on their whereabouts.¹⁷⁸ To the embarrassment of the Clinton Administration, Shalikashvili’s assertion was countered by a Washington-based group called the Coalition for International Justice, which had been able to locate most of the indicted war criminals from telephone directories and news re-

173. *Id.*

174. See Kenneth Roth, *Why Justice Needs NATO*, NATION, Sept. 22, 1997, at 21-22 (providing detailed responses to each of these excuses for non-action).

175. Nash Interview, *supra* note 165.

176. See *All Things Considered*, N.P.R. Broadcast, Feb. 12, 1996.

177. See *id.*

178. See Colon Soloway & Stephen J. Hedges, *How Not to Catch a War Criminal*, U.S. NEWS & WORLD REP., Dec. 9, 1996, at 63-64.

ports.¹⁷⁹ A year later, military officials acknowledged that the claim that they lacked intelligence information was largely false, and that Western military officials have long known where virtually all of the alleged criminals are located.¹⁸⁰

With the election of Tony Blair as British Prime Minister, the United Kingdom began to press NATO for a more forceful policy on arresting indicted war criminals. Surprisingly, it was the United Nations peacekeeping force in Croatia, and not the NATO force, which made the first arrest. In June 1997, an agent of the Tribunal's Office of the Prosecutor lured indicted war criminal Slavko Dokmanovic out of Serbia and into Eastern Slavonia (Croatia), where he was apprehended by U.N. peacekeeping forces, and delivered to the Yugoslavia Tribunal.¹⁸¹

Encouraged by the success of the U.N. operation, a month later, on July 10, 1997, British IFOR troops arrested indicted war criminal Milan Kovacevic at his home in Republika Srpska and transferred him to the Tribunal.¹⁸² That same day, British forces shot and killed indicted war criminal Simo Drjaca, the former police chief in Prijedor, when he fired upon them as they sought his arrest.¹⁸³

Following Britain's lead, four months later, on December 18, 1997, Dutch IFOR troops, using tear gas and stun grenades, raided the homes and arrested Vlatko Kupreskic, and Anto Furundzija.¹⁸⁴ The two had been indicted for raping and murdering civilians in the Lasva Valley area of Bosnia in 1993.¹⁸⁵

Then, on January 22, 1998, American soldiers swept into the small town of Bijeljina and made their first arrest of an indicted war criminal in Bosnia: Goran Jelusic, a Bosnian Serb who liked to refer to himself as "the Serbian Adolf."¹⁸⁶ Jelusic commanded the Luka camp during May 1992, and is charged with systematically killing Muslims and com-

179. See Steven Lee Myers, *Rights Group Says Bosnian Suspects Flaunt Freedom*, N.Y. TIMES, Nov. 26, 1996, at A11.

180. See Smith, *supra* note 97, at A32.

181. See Prosecutor v. Slavko Dokmanovic, Decision on the Motion for Release by the Accused Slavko Dokmanovic, No. IT-95-13a-PT, T., Ch. II, Oct. 22, 1997 [hereinafter Dokmanovic, Decision on the Motion for Release]. Dokmanovic was Mayor of Vukovar, the capital of Eastern Slavonia, and administrator of the Ovchara area at the time of the massacre. He was charged with six counts of grave breaches of the Geneva Conventions, violations of the laws or customs of war, and crimes against humanity for his role in the massacre.

182. See Berger Press Briefing, *supra* note 129.

183. See *id.*

184. See Jonathan Steele, *Dutch Size War Crimes Suspects*, GUARDIAN (London), Dec. 19, 1997, at 11.

185. See *id.*

186. Republika Srpska unmoved by arrest of Serb "Hitler," AGENCE FRANCE PRESSE, Jan. 23, 1998, available in LEXIS, newsfile.

mitting other atrocities there. United States SFOR forces undertook a second snatch operation on September 27, 1998, resulting in the apprehension of indicted war criminal Stevan Todorovic, formerly the Serb chief of police in Bosanski Samac.¹⁸⁷ They undertook a third operation on December 2, 1998, resulting in the arrest of Radislav Krstic, a Bosnian Serb general charged with directing the 1995 attack on the "safe area" of Srebrenica, in which as many as 10,000 civilians were killed.¹⁸⁸ The most recent arrest occurred on December 20, 1999, when U.S. IFOR forces in Banja Luka arrested retired Serb Major General Stanislav Galic, who had commanded the Sarajevo Romanija corps, which subjected the civilian inhabitants of Sarajevo to continuous shelling and sniper fire from 1992-1995.¹⁸⁹

While U.S. Secretary of Defense, William Cohen, asserted that these arrests were "in keeping with the rules we have had all along,"¹⁹⁰ none of the persons who were the subject of these NATO actions were encountered in public at the time of their arrests. Thus, NATO officials put a new gloss on the description of the NATO mission, saying "the policy is to apprehend suspects on a case-by-case basis or if NATO troops encounter them on patrols." Under its modified mission statement, officials said NATO's strategy is to concentrate on "plucking low-hanging fruit" or capturing those war criminals that have the least protection and the most predictable daily routines."¹⁹¹

Payam Akhavan of the Office of the ICTY Prosecutor describes the reason for the July 1997 change in the NATO policy on arresting war criminals as follows:

As time went on, as the immediate objective of military disengagement was achieved, it became clear that the NATO force was not going to achieve stability if the Serb warlords continued to exercise power. . . . While I'm not at liberty to disclose the details, I can say that much of the determination to arrest these people . . . came from the soldiers on the ground and not from officials at NATO headquarters or distant capitals. There was a sense on the part of a lot of the soldiers on the ground that people like Milan Kovacevic and

187. See Robert MacPherson, *Bosnian Serb Snatched in NATO Operation*, AGENCE FRANCE PRESSE, Sept. 27, 1998, available in LEXIS.

188. See *Statement by the Prosecutor Regarding the Detention of Radislav Krstic*, ICTY Press Release No. JL/PIU/368-E (Dec. 2, 1998); Steven Erlanger, *Bosnian Serb General Is Arrested By Allied Force in Genocide Case*, N.Y. TIMES, Dec. 3, 1998, at A1.

189. *Bosnian Serb General Arrested on War Crimes Charges*, AGENCE FRANCE PRESSE, Dec. 20, 1999, available in LEXIS.

190. Jeffrey Fleishman, *U.S. Forces Make First Bosnian War-Crimes Arrest*, FRESNO BEE, Jan. 23, 1998, at A14.

191. Smith, *supra* note 97, at A32.

Simo Drljaca were one of the main destabilizing factors and they had to be removed one way or another. The fact that there were indictments on these two people became a very convenient pretext to get rid of them. So, I'm not saying that the impulse was to support justice but rather that the existence of the tribunal was very convenient.¹⁹²

The new NATO policy came under criticism by Carl Bildt, the United Nations High Representative for Bosnia, who complained that going after minor figures served as "giving advanced warning" to the higher level indicted war criminals such as Karadzic and Mladic, and risked destabilizing the fragile peace in Bosnia.¹⁹³ But the arrests of Kovacevic, Kupreskic, Furundzija, Jelisic, Todorovic, and Galic, and the killing of Drljaca had the effect of inducing other indicted war criminals to turn themselves in, lest they be brought in by the NATO troops dead or alive. Thus, a dozen indicted war criminals surrendered to the Tribunal in the months after the first few British, Dutch, and American snatch operations.¹⁹⁴

Not all of the segments of IFOR, however, adopted this more aggressive case-by-case approach to arresting indicted war criminals. The French, which command the NATO troops that patrol the Serb stronghold of Pale (where Karadzic is believed to reside) have expressed no enthusiasm for capturing war criminals. An unnamed Senior U.S. Official told the *Washington Post* that

France's inaction may be partly due to the trauma experienced by the French military command in May 1995, when Serb forces captured dozens of French officers employed as observers by the United Nations and chained them to bridges or radar sites that were prospective NATO bombing targets. They want no repeat of this and therefore no involvement with war criminals at all.¹⁹⁵

France's reluctance was exemplified in March 1998, when a Serb named Dragoljub Kunarac, indicted in June 1996 on charges of gang rape, torture, and enslavement of Muslim women, first offered to surrender to French military forces in the town of Pilipovic in eastern Bosnia.¹⁹⁶ Nearly a week passed before the French concluded that "they couldn't avoid taking his surrender," said one U.S. official, who added that Washington has evidence that the French military command deferred to several senior officials in the Bosnian Serb govern-

192. Akhavan Interview, *supra* note 161.

193. See Batuk Gathani, *Most Notorious War Criminals at Large*, HINDU, July 15, 1997, at 10.

194. See Ewen Allison, *News from the International War Crimes Tribunals*, 5 HUM. RTS. BRIEF 3 (1998).

195. Smith, *supra* note 97, at A32.

196. See *id.*

ment.¹⁹⁷ Only after the Serbs gave their private approval did the French take Kunarac into custody and transfer him to the Tribunal.¹⁹⁸

The French problem came to a head in April 1998, when *The Washington Post* reported that in the summer of 1997 the United States was forced at the last minute to abort plans for the apprehension of Radovan Karadzic when it was discovered that a senior French military officer held secret meetings with Karadzic.¹⁹⁹ Afterwards, senior Clinton Administration officials acknowledged that "they were quite close to carrying it out, having determined how to arrange the capture and which troops would be involved."²⁰⁰ A senior official was quoted as saying he found the episode "despicable and appalling" and that "no trust" remains between the U.S. and French military forces in Bosnia, a development that has led Washington to end virtually all consultations with the French about the possible capture of indicted war criminals.²⁰¹

Subsequently, the United States announced that it did not intend to renew the effort to apprehend Karadzic.²⁰² One can only guess whether the announcement accurately reflected American policy, was designed to keep Karadzic off-guard, or was merely an effort to deflate public expectations. While seizing Karadzic would have been a public relations boon for the United States, by going public about the aborted operation and blaming the French for its failure, the United States succeeded in deflecting criticism of its anemic policy on arresting indicted war criminals. In the three years since the aborted operation to seize Karadzic, the United States has made no overt effort to take the Bosnian Serb leader into custody. And despite indications that IFOR had adopted a more robust policy with respect to arresting lower level indicted war criminals (and reports that the United States had established a specially trained unit for this purpose), there have

197. *Id.*

198. *See id.*

199. *See id.*

200. *Id.*

201. *See Smith, supra* note 97, at A32. In response to intense international criticism about the botched operation to apprehend Karadzic and the continuing failure of the French SFOR troops to arrest other indicted war criminals in their area of operation in Bosnia, the French troops conducted a daring predawn raid on April 3, 2000 in order to seize Karadzic's chief deputy, Momcilo Krajisnik. Emboldened by his troops' successful arrest of Krajisnik, French Defense Minister Alain Richard announced that "arresting Karadzic is now the French Army's prime objective." Kevin Cullen, *War Crimes Tribunal Wins New Esteem*, BOSTON GLOBE, Apr. 17, 2000, at A1, A14.

202. *See AP, US Reportedly Ends Plan to Catch Bosnia War Criminals*, BOSTON GLOBE, July 26, 1998, at A14.

been only a few subsequent arrests of indictees by the NATO forces.²⁰³

If the ICC is to act in the aftermath of international or internal conflicts, it is likely that United Nations or coalition peacekeeping forces will be deployed to areas where persons indicted by the ICC are located. Where these troops are commissioned by the U.N. Security Council or a specific peace agreement, they can be given the authority to arrest such persons pursuant to the ICC's arrest warrants. The experience of the ICTY, however, suggests that the force commanders will be reluctant to undertake this role. It is therefore important that the Security Council Resolution or peace agreement specifically give the troops the responsibility as well as the authority to make arrests—the more explicit the mandate for arresting war criminals, the better.

C. Luring as a Means to Effectuate Arrests

1. Distinguishing Lawful Apprehension from Unlawful Abduction

With respect to the ICTY, the Dayton Peace Accords,²⁰⁴ Security Council Resolution 1031,²⁰⁵ and the subsequent agreement of the Bosnian Government²⁰⁶ make clear that NATO forces could lawfully exercise police powers (including arresting indicted war criminals) in

203. See Richard J. Newman, *Hunting War Criminals*, U.S. NEWS & WORLD REP., July 6, 1998, at 45-48.

204. The Dayton Accords, initialed in Dayton, Ohio in the United States on November 21, 1995, and signed on December 14, 1995, in Paris, consist of a General Framework Agreement, 11 annexes, and various related documents. The parties to the General Framework Agreement include the three states which were parties to the conflict in the former Yugoslavia (Bosnia, Croatia, and the FRY), and the two entities of the state of Bosnia (the Federation of Bosnia and Herzegovina and the Republika Srpska). The FRY signed the General Framework Agreement on behalf of the Republika Srpska by virtue of an agreement between them on August 29, 1995; the Republika Srpska signed the annexes on its own behalf. In addition, the General Framework Agreement was initialed and later signed by the European Union and the Contact Group countries (France, Germany, the Russian Federation, the United Kingdom, and the United States).

205. The resolution recognizes that the parties to the Dayton Accords are required to cooperate fully with the ICTY and have authorized IFOR "to take such actions as required, including the use of necessary force," to implement the Tribunal's orders. U.N. SCOR, 50th Sess., 3607th mtg. at para. 5, U.N. Doc. S/RES/1031 (1995). See *Statements of the United Kingdom and the United States*, U.N. SCOR, 50th Sess., 3607th mtg., U.N. Doc. S/PV.3607 (1996) (statements of the United Kingdom at 8-9, and the United States at 19-21).

206. By letter dated December 21, 1995, the Bosnian Minister of Foreign Affairs agreed as follows:

With regard to the arrest warrant of the International war crimes Tribunal in the Hague concerning the citizens of the Republic of Bosnia and Herzegovina we agree that these tasks be performed, along with our police force, also by members of the IFOR. We also agree that those persons arrested in connection with the warrants of the tribunal be handed over by the IFOR to the International Tribunal for war crimes.

Diane F. Orentlicher, *Responsibility of States Participating in Multilateral Operations with Respect to Persons Indicted for War Crimes*, paper presented at the International Conference on

Bosnia. Further, Security Council Resolution 1037, which with the consent of Croatia and the FRY temporarily placed the administration of Eastern Slavonia under United Nations Transitional Administration for Eastern Slavonia ("UNTAES") gave the United Nations peacekeeping force the right to exercise police powers in that region of Croatia.²⁰⁷ Security Council Resolution 1244, which implemented the Kosovo agreement in June 1999, similarly gave the KFOR forces the authority to make arrests in Kosovo.²⁰⁸ Consequently, there is no violation of territorial integrity where coalition or United Nations personnel apprehend indicted war criminals in Bosnia, the Eastern Slavonia region of Croatia, or the Kosovo region of Serbia. Apprehensions conducted in other parts of the FRY or Croatia, however, are another matter.

Even without the consent of the FRY or Croatia, the principle of territorial integrity is not an absolute bar to apprehensions in their territory. International law permits a state, for instance, to enter another's territory in self-defense.²⁰⁹ Thus, a state's authorities may justifiably engage in an unconsented apprehension in another state against terrorists which pose a continuing threat and which are being given sanctuary in the latter state.²¹⁰ To the extent indicted war criminals located in the FRY or Croatia constitute a threat to the NATO or United Nations troops lawfully stationed in the territory of the former Yugoslavia, this could provide justification for abducting individuals from the FRY or Croatia for purposes of arrest.

Moreover, under the U.N. Charter, a state may enter another's territory when specifically authorized by the Security Council pursuant to its Chapter VII powers. Thus, the coalition forces that invaded Iraq during the Gulf War were acting in accordance with international law.²¹¹ Several Security Council Resolutions may be read together as giving the NATO force the authority to enter the FRY to apprehend

Reigning in Impunity for International Crimes and Serious Violations of Fundamental Human Rights, Siracusa, Italy, Sept. 16-20, 1997, at 5.

207. See U.N. SCOR, 51st Sess., 3619th mtg., U.N. Doc. S/RES/1037 (1996); *Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium*, signed on 12 November 1995, U.N. Doc. A/50/757 (1995); U.N. Doc. S/1995/951 (1995).

208. See U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999).

209. See U.N. CHARTER art. 51.

210. See Draft Articles on State Responsibility, [1979] 2 Y.B. Int'l L. Comm'n 93-94; Richard B. Lillich & John M. Paxman, *State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities*, 26 AM. U. L. REV. 217, 307-13 (1977).

211. See U.N. SCOR, 45th Sess., 2963rd mtg. at para. 2, U.N. Doc. S/RES/678 (1990); U.N. SCOR, 49th Sess., 3414th mtg. at para. 4, U.N. Doc. S/RES/940 (1994) (authorizing the invasion of Haiti to restore the Aristide government).

persons wanted by the ICTY.²¹² According to the ICTY Appeals Chamber in *Blaskic*, where the ICTY has made a judicial finding that a state has breached its obligation to arrest persons indicted by the ICTY under Article 29 of the ICTY Statute, and where "the Security Council [has] not decided that it enjoyed exclusive powers on the matter," states are permitted to take unilateral or collective enforcement actions.²¹³

The FRY has "not executed a single arrest warrant issued to it,"²¹⁴ including arrest warrants against three persons publicly charged along with Dokmanovic with complicity in the murder of 260 civilians and unarmed men following the fall of the city of Vukovar. The then President of the ICTY, Antonio Cassese, brought this non-compliance to the attention of the Security Council so that it could "decide upon the appropriate response."²¹⁵ On May 8, 1996, the Security Council issued a statement declaring that it "deplores the failure to date of the Federal Republic of Yugoslavia to execute the arrest warrants issued by the Tribunal against [these] individuals," but it has not yet taken further action against the FRY.²¹⁶ Under these circumstances, the NATO or United Nations forces may be justified in conducting law enforcement activities in the territory of the FRY notwithstanding the general prohibition against such conduct under international law. Consistent with this authority, NATO troops reportedly secretly entered the FRY in April 2000 and snatched former Bosnian Serb prison camp commander Dragan Nikolic from his home in the town of Smederevo, located in Serbia just outside of Belgrade.

National, coalition, or U.N. forces may be justified under analogous situations in apprehending persons indicted by a permanent international criminal court even without the consent of the state in whose territory the arrest occurs. But without the authorization of the Se-

212. See U.N. SCOR, 48th Sess., 3217th mtg. at para. 4, U.N. Doc. S/RES/827 (1993) (requiring states to comply with arrest orders pursuant to Article 29 of the ICTY Statute); S.C. Res. 1031 (1995) (establishing IFOR); U.N. SCOR, 51st Sess., 3723th mtg. at para. 18, U.N. Doc. S/RES/1088 (1996) (establishing SFOR as the successor to IFOR); ICTY's Rules of Procedure and Evidence, Rule 59 *bis* (A) IT/32/R5V.1 (1999) (authorizing the transmission of arrest warrants to an appropriate authority or international body); see also Burton, *supra* note 159, at 203-04 (expressing the opinion that ICTY has the authority to issue orders that are binding on Member States, including those participating in the NATO operation in Bosnia).

213. Prosecutor v. Blaskic, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, at para. 36, No. IT-95-AR108 *bis*, Appeals Chamber, Oct. 29, 1997.

214. Letter dated April 24, 1996, from the President of the International Criminal Tribunal for the Former Yugoslavia to the President of the ICTY, U.N. Doc. S/1996/319 (1996).

215. *Id.*

216. Statement of the President of the Security Council, U.N. Doc. S/PRST/1996/23 (1996).

curity Council, the consent of the territorial state in a peace agreement, or a situation that qualifies as self-defense, an apprehension of an indicted war criminal may constitute an "unlawful abduction" in violation of international law. Under international law, states and international organizations may exercise police powers inside the territory of another state only with the consent of the host state.²¹⁷ The unconsented exercise of such powers constitutes an infringement of the sovereignty and territorial integrity of the host state in violation of the U.N. Charter²¹⁸ and customary international law.

This principle finds support in several decisions of the International Court of Justice ("ICJ"), and its predecessor the Permanent Court of International Justice ("PCIJ"). In the 1927 *S.S. Lotus* case, for example, the PCIJ held that jurisdiction cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or convention.²¹⁹ In the 1929 *Corfu Channel* case, the ICJ recognized that "between independent States, respect for territorial sovereignty is an essential foundation" of international law.²²⁰ And in the 1986 *Military and Paramilitary Activities* case, the ICJ ruled that "the principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers its part and parcel of customary international Law."²²¹

While none of these cases dealt specifically with the conduct of foreign police or investigators in a state without its permission, the precedent is widely seen as prohibiting such action. Thus, the *Restatement (Third) of Foreign Relations Law* provides that "a state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state."²²² This position was confirmed by the United Nations Sixth (Legal) Committee, whose members reached consensus that "international law prohibits a state from exercising its criminal jurisdiction beyond its territory as contrary to the sovereign equality and territorial integrity of states, unless the other state concerned has

217. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 307 (4th ed. 1990).

218. U.N. CHARTER art. 2(4).

219. *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18.

220. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, at 35.

221. *Military and Paramilitary Activities* (Merits) (Nicar. v. U.S.), 1986 I.C.J. 14, 106.

222. *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 432(2) (1986).

given its consent.”²²³ Similarly, the Working Group on Arbitrary Detention of the U.N. Commission on Human Rights has taken the position that a basic principle of international law and international relations is the “respect for the territorial sovereignty of States.”²²⁴ Citing the decisions of the PCIJ and ICJ mentioned above, the Working Group concluded that this principle prohibits a state from engaging in unconsented law enforcement activity in the territory of another state.²²⁵

2. *The Effect of an Unlawful Abduction on the Jurisdiction of an International Criminal Court*

While recognizing that international law prohibits unconsented abductions, the domestic courts of some countries employ the *mala captus bene detentus* principle, meaning a person improperly seized may nevertheless properly be detained.²²⁶ International precedent for the principle goes back to the abduction of Adolf Eichmann, the engineer of Hitler’s “Final Solution,” from Argentina by Israeli agents. The Security Council adopted a resolution recognizing that the abduction violated international law and requiring Israel to make “appropriate reparation” to Argentina.²²⁷ The resolution, however, did not require Eichmann’s return, and Argentina settled for a simple apology given the universally condemned nature of Eichmann’s crimes.²²⁸ Eichmann was subsequently tried, convicted, and executed in Israel without further objection by the international community.²²⁹

The U.S. Supreme Court recently reaffirmed application of the *mala captus bene detentus* principle in the case of *United States v. Alvarez-Machain*.²³⁰ There, a Mexican doctor was abducted from Mexico by U.S. agents and prosecuted in the United States for the torture-murder of a DEA agent. The *Alvarez-Machain* case, however, has been met with widespread criticism throughout the international com-

223. Virginia Morris & M. Christiane Bourloyannis-Vrailas, *The Work of the Sixth Committee at the Forty-Eighth Session of the U.N. General Assembly*, 88 AM. J. INT’L L. 343, 357-58 (1993).

224. *Report of the Working Group on Arbitrary Detention*, U.N. ESCOR, Hum. Rts. Comm., 50th Sess., Agenda Item 10, at 139-40, U.N. Doc. E/CN.4/1994/27 (1993) [hereinafter *Arbitrary Detention*].

225. *See id.* at 139.

226. *See* M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 190 (1987).

227. 1960 U.N.Y.B. 196, U.N. SCOR, 47th Sess., 868th mtg., U.N. Doc. S/4349 (1960).

228. *See* Paul Mitchell, *English-Speaking Justice: Evolving Responses to Transnational Forcible Abduction After Alvarez-Machain*, 29 CORNELL INT’L L.J. 383, 422-23 (1996).

229. *See id.*

230. *United States v. Alvarez-Machain*, 504 U.S. 655, 669 (1992) (holding that United States courts had jurisdiction to try an individual forcibly abducted from Mexico without its consent).

munity.²³¹ Less than a year after the *Alvarez-Machain* decision, the United Kingdom's House of Lords emphatically rejected the *mala captus bene detentus* rule as inconsistent with evolving standards of human rights.²³² At about the same time, twenty-one co-sponsoring states introduced a General Assembly resolution that would request an advisory opinion from the International Court of Justice "on the question of the conformity with international law of certain acts involving the extraterritorial exercise of coercive power of a State and the subsequent exercise of criminal jurisdiction."²³³ While the resolution seeking an advisory opinion has been repeatedly deferred,²³⁴ the U.N. Working Group on Arbitrary Detention concluded that "[the] detention of Humberto Alvarez-Machain is declared to be arbitrary, being in contravention of . . . Article 9 of the International Covenant on Civil and Political Rights"²³⁵

Article 9 of the International Covenant on Civil and Political Rights provides that everyone has the right to liberty and security of person, that "no one shall be subjected to arbitrary arrest or detention," and that "no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."²³⁶ The Human Rights Committee, which was established to monitor the implementation of the Covenant, has ruled on several occasions that transborder abductions violate Article 9 of the Covenant.²³⁷ Interpreting a similar provision in the European Convention for the Protection of Human Rights,²³⁸ the European Court of Human Rights has stated that where state authorities are involved in a luring, the rights of the individual under the Convention are violated.²³⁹ These

231. See Mark S. Zaid, *Military Might Versus Sovereign Right: The Kidnapping of Dr. Humberto Alvarez-Machain and the Resulting Fallout*, 19 Hous. J. INT'L L. 829, 853-55 (1997).

232. See *Regina v. Horseferry Road Magistrates' Court (ex parte Bennett)*, [1994] 1 App. Cas. 42 (Eng. H.L. 1993) (holding that a New Zealand citizen, forcibly returned to England from South Africa, could obtain a stay of the criminal proceedings against him in England).

233. *Morris & Bourloyannis-Vrailas*, *supra* note 223, at 620 n.84.

234. *Id.* at 620.

235. *Arbitrary Detention*, *supra* note 224, at 139-40.

236. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171, at art. 9(1).

237. See *Views of the Human Rights Committee Under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights*, U.N. GAOR, Hum. Rts. Comm., 36th Sess., Supp. No. 40, at 176, 185, U.N. Doc. A/36/40 (1981).

238. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221, at art. 5.

239. See *Stocke v. Germany*, Eur. Ct. H. R. (ser. A.) at 839 (1991) (Annex, Opinion of the Commission, at para. 167). The Trial Chamber in the *Dokmanovic* case distinguished *Stocke v. Germany* on the ground that "there was an extradition treaty between France and Germany, the procedures of which were clearly not followed." See *Dokmanovic*, Decision on the Motion for Release, *supra* note 181, at n.86.

precedents would suggest that an international criminal tribunal would have to dismiss a case where the defendant has been abducted in violation of international law.

3. *Luring as an Alternative to Unlawful Abduction*

As an extraterritorial law enforcement practice, luring is much more common, and less objectionable, than abductions. Unlike abduction by force, weapons are not used to get the suspect to the location where the arrest will occur. A luring can be accomplished telephonically, by fax, or by e-mail. In this way, physical presence of law enforcement authorities in the territory of the host state can be avoided. Therefore, the risk of injury, damage, or incident in the host state is minimized.

The ICTY had occasion to rule on the legality of luring in the case of Slavko Dokmanovic, a Croatian Serb who was indicted in 1996 for his complicity in the greatest single massacre of the 1991 war in Croatia—the execution of 260 people forcibly taken out of a hospital in Vukovar, eastern Croatia.²⁴⁰ The same day the indictment was issued, an order for Dokmanovic's arrest was secretly transmitted to the UNTAES,²⁴¹ directing the U.N. forces to search for, arrest, and surrender Dokmanovic to the ICTY.

Unfortunately, by the time UNTAES received the order for Dokmanovic's arrest, he had moved from the Eastern Slavonia region of Croatia to the FRY,²⁴² which had failed to execute the warrants that remain outstanding for the arrest of the three co-accused in the indictment against Dokmanovic.²⁴³ The ICTY's Office of the Prosecutor (OTP) thus turned to "plan B"—in June 1997, Kevin Curtis, an OTP investigator, met with Dokmanovic at his home in the FRY in an effort to lure Dokmanovic into Eastern Slavonia for arrest by UNTAES. Curtis purported to set up a meeting between Dokmanovic and General Jacques Klein, the Transitional Administrator of Eastern Slavonia, for the stated purpose of arranging for possible compensation for Dokmanovic's property in Eastern Slavonia, which he had been forced to abandon.²⁴⁴ In accordance with this arrangement, on the afternoon of June 27, 1997, Dokmanovic crossed the border into Eastern Slavonia under what he believed was a promise of safe con-

240. *See supra* note 181.

241. UNTAES was established to administer the region of Eastern Slavonia pending its return to Croatian control. *See* S.C. Res. 1037.

242. *See* Dokmanovic, Decision on the Motion for Release, *supra* note 181, at para. 7.

243. The addition of Dokmanovic to the indictment was not disclosed to the FRY.

244. *See id.* at paras. 8-10.

duct, and voluntarily entered an UNTAES vehicle which was to take him to meet General Klein at the UNTAES base in the town of Erdut. Upon arriving at Erdut, UNTAES soldiers removed Dokmanovic from the vehicle at gunpoint and handcuffed him, while a member of the OTP advised him of his rights and the charges against him.²⁴⁵ Dokmanovic was then flown on board an UNTAES airplane to The Hague and handed over to the ICTY for trial.

In a pretrial motion, counsel for Dokmanovic argued that the manner of Dokmanovic's arrest was illegal, violating the Statute and Rules of the ICTY, the sovereignty of the FRY, and international law. In particular, the defense argued that "Dokmanovic was arrested in a 'tricky way,' which can only be interpreted as a 'kidnapping,'" and that "Dokmanovic's arrest violated the sovereignty of the FRY and international law because he was arrested in the territory of the FRY without the knowledge or approval of the competent State authorities."²⁴⁶

The ICTY ruled that Dokmanovic had standing to raise these issues.²⁴⁷ However, it rejected Dokmanovic's arguments, concluding that "the means used to accomplish the arrest of Mr. Dokmanovic neither violated principles of international law nor the sovereignty of the FRY."²⁴⁸ This precedent will be useful to a permanent international criminal court, which may directly or through third parties resort to luring as a method of obtaining custody over offenders present in non-cooperating states.

D. Assassination of Indicted War Criminals

On July 10, 1997, British IFOR troops shot and killed indicted war criminal Simo Drjaca, the former police chief in Prijedor, when he attempted to resist arrest.²⁴⁹ These troops did not shoot to wound the Serb war lord, but rather brought overwhelming force to bear on this single lightly armed individual.²⁵⁰ Consequently, there has been conjecture that the British troops used the international arrest warrant as an excuse to kill Drjaca, who had become a major impediment to their mission.²⁵¹

245. *See id.* at para. 11.

246. *Id.* at paras. 16-18.

247. *See id.* at para. 76.

248. *Id.* at para. 88.

249. *See Berger Press Briefing, supra* note 129.

250. *See id.*

251. Akhavan Interview, *supra* note 161.

Targeting civilian leaders has traditionally been viewed as unlawful "assassination" both in war and non-war contexts. Where an armed conflict exists between states, international assassination constitutes a war crime. Article 23(B) of the Hague Convention IV of 1907, provides that "it is especially forbidden . . . to kill or wound *treacherously*, individuals belonging to the hostile nation or army."²⁵² The United States Army's field manual on the law of land warfare has incorporated this prohibition in the following terms: "This article . . . prohibits *assassination*, proscription or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy 'dead or alive.'"²⁵³

Yet, the 1907 Hague Convention's prohibition on assassination is not as broad as it might appear at first blush. Focusing on the "treacherous" requirement of the Hague Convention, a recent U.S. military legal analysis of war time assassination concluded that none of the following acts contravened the prohibition: (1) the November 18, 1941 raid by Scottish commandos at Bedda Littoria, Libya whose goal was to kill German Field Marshal Erwin Rommel; (2) the April 18, 1943 downing of a Japanese aircraft known to be carrying Admiral Osoruku Yamamoto by a U.S. Air Force jet fighter; and (3) the October 30, 1951 air strike by the U.S. Navy that killed 500 senior Chinese and North Korean military officers and security forces at a military planning conference at Kapsan, North Korea.²⁵⁴

Where agents of one state assassinate the official of another state in a non-war context, the action may constitute an act of terrorism. Article 2(a) of the Convention on Internationally Protected Persons, to which the United States and most other countries are parties, criminalizes "the intentional commission of . . . murder, kidnapping or other attack upon the person or liberty of an internationally protected person," which are defined to include heads of state and other high level officials.²⁵⁵ It is important to note, however, that the Internationally Protected Persons Convention accords a target protected sta-

252. Convention (No. IV) Respecting the Laws and Customs of War on Land, With Annex of Regulations, Oct. 18, 1907, art. 23(b), 36 Stat. 2277, T.S. No. 539 (emphasis added).

253. Scharf, *Clear and Present Danger*, *supra* note 122, at 496 n.94.

254. See W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW., Dec. 1989, at 4, 5 (Dept. of the Army Pamphlet 27-50-204).

255. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *adopted* by the General Assembly of the U.N. on Dec. 14, 1973, 28 U.T.S. 1975, 1037 U.N.T.S. 167.

tus only when the target of assassination is outside of his/her country's borders.²⁵⁶

In 1975, President Gerald R. Ford promulgated Executive Order 12,333, which provides "No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination."²⁵⁷ Although Executive Order 12,333 has been reissued by Presidents Carter, Reagan, Bush, and Clinton,²⁵⁸ its value is more symbolic than real. A president can evade the ban posed by the Executive Order and legally carry out an assassination in four ways: (1) he can declare the existence of hostilities and target persons in command positions as combatants; (2) he can broadly construe Article 51 of the U.N. Charter and interpret certain criminal acts as legitimating assassination as a use of force in self-defense; (3) he can narrowly construe Executive Order 12,333, for instance, to prohibit only "treacherous" attacks on foreign leaders; and (4) he can simply repeal or amend the order, or even approve a one time exception to it.²⁵⁹

The contours of the Executive Order were tested by the 1986 bombing of Libyan leader Colonel Muammar Qaddafi's personal quarters in Tripoli in response to Libyan involvement in the bombing of the La Belle Disco in West Berlin. According to investigative reporter Seymour M. Hersh, who spent three months interviewing more than seventy current and former officials in the White House, the State Department, the Center for Intelligence Agency ("CIA"), the National Security Agency, and the Pentagon, Qaddafi's assassination was the primary goal of the Libyan bombing.²⁶⁰ Hersh reported that nine of the eighteen American fighter jets that flew to Tripoli on April 14, 1986, had a specific mission to target Qaddafi and his family.²⁶¹ He quoted one well-informed Air Force intelligence officer as stating: "There's no question they were looking for Qaddafi. It was briefed that way. They were going to kill him."²⁶² The Reagan administration characterized the attack as a legitimate self-defense operation under Article 51 of the U.N. Charter in light of evidence that Libya was

256. The Convention defines an "internationally protected person" as a "[h]ead of State, including any member of a collegial body performing the functions of a Head of State under the constitution of the State concerned, a Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany him." *Id.* at art. 1(1)(a).

257. Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (1981).

258. Boyd M. Johnson, III, *Executive Order 12,333: The Permissibility of an American Assassination of a Foreign Leader*, 25 CORNELL INT'L L.J. 401, 403 (1992).

259. *See id.* at 417.

260. *See* Seymour M. Hersh, *Target Qaddafi*, N.Y. TIMES MAG., Feb. 22, 1987, at 17.

261. *See id.*

262. *Id.* at 20.

planning future terrorist attacks against the United States.²⁶³ Shortly thereafter, Senior Army lawyers made public a memorandum that concluded that Executive Order 12,333 was not intended to prevent the United States from acting in self-defense against "legitimate threats to national security."²⁶⁴

In accordance with that assessment, during the Persian Gulf War in 1990, Air Force Chief of Staff Michael J. Dugan publicly stated that the United States had sought to "decapitate" Iraqi leadership by targeting Saddam Hussein, his family, and even his mistress.²⁶⁵ Nine years later, the United States specifically targeted Serb President Slobodan Milosevic's residence during the NATO airstrikes, seeking to remove the intransigent leader.²⁶⁶ In light of these events, an increasing number of scholars have suggested that assassination has become a legitimate preemptive strategy.²⁶⁷ By analogy to the domestic criminal law concept of "necessity,"²⁶⁸ these commentators argue that assassination can be justified under a balance of harms analysis.²⁶⁹

Assassination of indicted war criminals might make sense from a military perspective, and it might induce other indicted war criminals to turn themselves in. While assassination may achieve a sense of "ac-

263. See President Ronald Reagan, Address to the Nation (Apr. 14, 1986), in DEP'T ST. BULL., June 1986, at 1-2.

264. Parks, *supra* note 254, at 8.

265. See Robert F. Turner, *Killing Saddam: Would it be a Crime?*, WASH. POST, Oct. 7, 1990, at D1.

266. See Paul Richter, *Milosevic Not Home As NATO Bombs One of His Residences*, L.A. TIMES, Apr. 23, 1999, at A34.

267. See Louis R. Beres, *The Permissibility of State-Sponsored Assassination During Peace and War*, 5 TEMPLE INT'L & COMP. L.J. 231, 240 (1992); Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609, 646 (1992); Turner, *supra* note 266, at D1.

268. See MODEL PENAL CODE § 3.02 (1985) (providing that conduct believed necessary to avoid some harm is justifiable if "the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged"); Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289 (1974).

269. See Beres, *supra* note 267, at 240. Beres suggests the following prerequisites to an assassination:

First, a state must make a good faith effort to circumscribe potential targets to include only those authoritative persons in the prospective attacking state. Second, the assassination must comply with the settled rules of warfare as they concern discrimination, proportionality, and military necessity. Third, state-gathered intelligence must evidence, beyond a reasonable doubt, preparations for unconventional or other forms of highly destructive warfare projected against the acting state. Finally, the state must have decided after careful deliberation that an assassination would in fact prevent the intended aggression, and that it would cause substantially less harm to civilian populations than alternative forms of self-help.

Id.

countability," it is inconsistent with several of the other goals of international criminal justice, namely achieving truth telling, deterrence, and reconciliation. Without a living defendant, there can be no presentation of evidence at trial, and therefore no production of a historical record. Far from deterring acts of violence, assassination is likely to lead to escalated violence in revenge. In addition to the risk of retaliation, targeting specific individuals may unintentionally strengthen enemy morale and resolve. Moreover, the targeted individuals are likely to be replaced by others who will continue their threatening policies, thereby frustrating the goal of reconciliation.

E. The Consequences of the Failure to Arrest High Level Indictees

Despite the occasional success of a luring operation, assassination, or apprehension, the ICTY has not obtained custody over the three most important indictees—Bosnian Serb leader Radovan Karadzic, Bosnian Serb military commander Ratko Mladic, or Serb President Slobodan Milosevic.

In December 1995, *The International Herald Tribunal* summarized the effect of the international indictments on Bosnian Serb leaders Radovan Karadzic and Ratko Mladic as follows:

General Ratko Mladic, the Bosnian Serbian warrior charged with the massacre of thousands of Muslim men, now spends much of his time isolated in a mountain bunker surrounded by a coterie of officers. His moods are said to swing from rage to uneasy calm. His partner, Radovan Karadzic, the psychiatrist-turned-politician, had his political program swept out from under him by the Bosnian peace accord. Those who have seen him say that his speech is often slurred, apparently the effect of medication, and his robust physique has been withered by anxiety as he faces an uncertain future that includes an indictment for war crimes. This is the picture acquaintances draw of the two men: beaten men desperately dealing to save their jobs and stay away from the International War Crimes Tribunal at The Hague.²⁷⁰

Based on this portrayal, Payam Akhavan of the Yugoslavia Tribunal's Office of the Prosecutor argued that "absent their arrest and surrender to the Tribunal, the indictment of political and military leaders, and the consequent stigmatization, deprivation of liberty, and removal from public office has had the effect of an interim justice."²⁷¹

But in the months to follow, buoyed by the NATO "monitor, don't touch" policy, Karadzic, Mladic, and their followers would completely

270. Jane Perlez, *Karadzic and Mladic: No More Swagger for 2 Losers*, INT'L HERALD TRIB., Dec. 16, 1995, available in LEXIS, Nexis Library.

271. Akhavan, *The Yugoslavia Tribunal*, *supra* note 27, at 273.

rebound. Karadzic may have been forced to relinquish his official position, but like an evil puppet master he retained effective power in the Republika Srpska to the detriment of a Bosnian peace. As one human rights monitoring organization concluded, Karadzic "still continues to exercise complete control over all events in the Republika Srpska."²⁷² From behind the scenes Karadzic runs the Serb nationalist-based party known as the SDS, which controls the Republika Srpska's police, court system, media, and major industries.²⁷³ He also dominates a network of underground Bosnian Serb paramilitary organizations, whose plans include destabilizing the peace process, creating opposition to IFOR and international agencies within the Bosnian Serb population in Republika Srpska, stirring up general animosity towards the Bosniak-Croat Federation, and destroying any moderate-line Serb elements.²⁷⁴

Emboldened by IFOR's inaction against him, "Karadzic has undermined virtually every major non-military provision of the Dayton Accords."²⁷⁵ The first test came in February 1996, when Serb-held neighborhoods in Sarajevo were transferred to the authority of the Bosniak-Croat Government.²⁷⁶ Heeding the calls of Karadzic, the Serbs burned down their homes and fled rather than remain in an ethnically mixed neighborhood. Then in September 1996, Karadzic derailed the possibility of a credible voter registration process, leading to the postponement of municipal elections.²⁷⁷

For this reason, the newly appointed United Nations High Representative for Bosnia has said: "As long as [the major indicted war criminals] are at large, there is not going to be a normal life in Bosnia, not only for rule of law reasons but also because of their influence in politics and economy in the country. . . . They have to go to The Hague."²⁷⁸ Echoing this sentiment, U.N. Secretary-General Kofi Annan stated: "Indicted war criminals are having far too much influence on developments, particularly in the Republika Srpska, to be left at large."²⁷⁹

272. *Bosnia-Herzegovina: The Continuing Influence of Bosnia's Warlords*, HUM. RTS. WATCH, Dec. 1996.

273. *See id.*

274. *See id.*

275. Orentlicher, *supra* note 172, at 716.

276. *See id.*

277. *See id.*

278. John Pomfret & Lee Hockstader, *In Bosnia, a War Crimes Impasse NATO Differences With U.N. Tribunal Mean Few Are Arrested*, WASH. POST, Dec. 9, 1997, at A17.

279. Reuters, Sept. 1, 1997.

Calling for NATO to take action in particular to arrest Radovan Karadzic, Deputy High Representative Jacques Klein has stated: "Karadzic's presence still casts a cloud over what we do and it would be nice to have the political will to do what needs to be done because it poisons the atmosphere."²⁸⁰ Canadian Foreign Minister Lloyd Axworthy was even more blunt in his assessment: "Without firm action on war crimes, reconciliation is doomed."²⁸¹ And without reconciliation, the NATO force will either be forced to remain in Bosnia indefinitely, or war will break out as it withdraws. As a Senior NATO official acknowledged, "[u]nless Karadzic and other war criminals are captured before our peacekeepers go home, there is a good chance that the war could return and all our good efforts would be in vain."²⁸²

In addition to damaging the goal of peace-building in Bosnia, the failure to make arrests has eroded any deterrent value the Yugoslavia Tribunal might have had. Notwithstanding Akhavan's theory of "interim justice," international indictments alone have little value if they are not backed up with an expectation of consequences. While critics of the Tribunal point to the Srebrenica massacre in 1995 and ethnic cleansing in Kosovo in 1998-1999 as evidence that the existence of the Tribunal had no deterrent effect, the Yugoslavia Tribunal's Prosecutor counters that the lack of deterrence is due to the failure of NATO to make arrests in Bosnia.²⁸³ In addition to deterrence in the former Yugoslavia, Goldstone believes "the failure to make arrests also risks destroying the broader deterrent value of the Tribunal. Future tyrants will be given notice that they also have nothing to fear from international justice for as long as they are surrounded by armed guards."²⁸⁴

Finally, the failure to arrest has undermined the credibility of both NATO and the ICTY. Just as the "craven acquiescence" in ethnic cleansing by the United Nations Protection Force in Bosnia deeply compromised the credibility of the United Nations, a continuing failure to arrest indicted war criminals has made NATO appear weak, and has diminished the credibility of the Tribunal as a mechanism for justice.²⁸⁵ In response, the President of the Tribunal, Judge Antonio

280. Deputy High Representative Jacques Klein, Reuters, Nov. 22, 1998.

281. Fred Barbash, *Conference Hints Cutoff of Aid to Bosnian Rivals; Serbs Considered Main Target of London Warning*, WASH. POST, Dec. 5, 1996, at A39.

282. William Drozdiak, *NATO Chiefs Block Call for Pursuit of War Criminals*, WASH. POST, June 13, 1997, at A36.

283. Joint Press Conference of Secretary of State Madeleine Albright and Justice Louise Arbour, International Criminal Tribunal for the Former Yugoslavia, Washington, D.C., Apr. 30, 1999.

284. Richard Goldstone, *Bosnia-Herzegovina: The Responsibility to Act*, INTER PRESS SERV., June 27, 1996, available at 1996 WL 10767854.

285. See Orentlicher, *supra* note 172, at 715.

Cassese, gave the Western States an ultimatum in 1996: either they take more aggressive actions to arrest leaders indicted for crimes against humanity in Bosnia, or he and his fellow judges "will propose to the Security Council to close down the Tribunal [because it] is becoming an exercise in hypocrisy."²⁸⁶ Although the series of arrests conducted by NATO forces in 1997 staved off this threat, the handful of arrests of low-level indictees is but a bandaid to the Tribunal's hemorrhaging credibility.

After Slobodan Milosevic was indicted by the ICTY on May 24, 1999 for crimes against humanity in Kosovo, the United States announced that it would make no effort to forcibly take him into custody.²⁸⁷ Unlike in Bosnia, where NATO troops patrol areas in which the indicted war criminals reside, there is no authorized NATO presence in Serbia other than in the province of Kosovo. Furthermore, as long as Milosevic remains in power, and is protected by the Yugoslav police and military, it would be extraordinarily difficult to launch a successful snatch operation without massive casualties. For now, his punishment is to become a prisoner within the borders of Serbia. The indictment has made him a pariah abroad and has undermined his support at home. But until he is brought to justice at The Hague, he is likely to remain a threat to the region.

VI. CONCLUSION

Like the ICTY, the inherent weakness of the ICC will be the need often to rely on the voluntary cooperation of the very governments whose officials and personnel it seeks to prosecute. In the absence of voluntary cooperation, the international community has generated an impressive arsenal of indirect enforcement mechanisms for the ICTY, which are potentially of great use to the ICC. As detailed above, these include condemnation by the Assembly of State Parties or the U.N. Security Council; offers of individual cash rewards for assistance in locating and apprehending indicted war criminals; use of luring to obtain custody over indicted war criminals by deception; freezing the assets of indicted war criminals; offers of economic incentives to governments to induce cooperation; imposition of diplomatic and economic sanctions on non-cooperating governments; and use of military force to effectuate apprehension.

286. See Robert Marquand, *Bosnia War Crimes Judge Talks of Quitting*, CHRISTIAN SCI. MON., Oct. 22, 1996, at 1.

287. Secretary of State Madeleine K. Albright, Interview on Fox News, Washington, D.C. (May 28, 1999).

Yet, owing to a lack of political will and divergent interests of key states, the international community has to date not sufficiently employed these enforcement tools, prompting the ICTY to warn the U.N. General Assembly that “[t]he potential benefits of the Tribunal’s work can not be realized until the international community demonstrates the same commitment to empower the Tribunal as it had shown when it established it.”²⁸⁸ The ICTY has struggled with funding, with lack of support from the U.N. Security Council, and above all with arrests.

As a result, seven years after its establishment, the ICTY still has not obtained custody over the major war criminals most responsible for the Balkan atrocities. The failure to bring these indicted leaders to justice has severely damaged the goal of peace-building in the former Yugoslavia, subverted the credibility of the ICTY, and undermined any deterrent value the ICTY might have had both in the former Yugoslavia and around the world.

Given the impressive array of enforcement mechanisms which have been employed in connection with the ICTY, one might have high hopes for the success of the ICC. Yet, in light of the ICTY’s limited success with these mechanisms, one must temper those hopes with modest expectations. In the end, the ICC will succeed only where international justice and power can be brought together.

288. *Fifth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of the International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, U.N. GAOR, 53rd Sess., at para. 276, U.N. Doc. S/1998/737 (1998).

